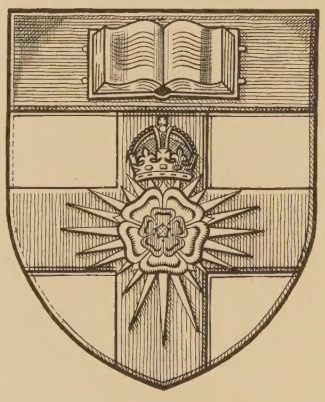
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

R

346.4
Mx North Gallery



UNIVERSITY OF LONDON
LIBRARY

THE

LAW REPORTS.

539N

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

REPORTERS.

Court of Appeal	H. CADMAN JONES, MARTIN WARE, W. LLOYD CABELL,	*Barristers-at-Law.*
V.-C. Bacon	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers-at-Law.*
V.-C. Hall	T. F. MORSE, W. WORSLEY KNOX,	*Barristers-at-Law.*
Mr. Justice Fry	W. LLOYD CABELL, CHALONER W. CHUTE,	*Barristers-at-Law.*
Mr. Justice Kay	T. W. GUNNING, CHARLES MARETT,	*Barristers-at-Law.*
Mr. Justice Chitty	G. I. FOSTER COOKE, GEORGE MURRAY,	*Barristers-at-Law.*
C. J. Bacon	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers at-Law.*

VOL. XXI.

1882.—XLV. & XLVI. VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1882.

BIBL. LONDIN UNIV.

Lord Selborne,	*Lord Chancellor.*
Sir George Jessel,	*Master of the Rolls.*
Sir Richard Baggallay,	*Lords Justices of the Court of Appeal.*
Sir William Baliol Brett,	
Sir Henry Cotton,	
Sir Nathaniel Lindley,	
Sir John Holker,	
Sir C. S. C. Bowen,	
Sir James Bacon,	*Vice-Chancellors.*
Sir Charles Hall,	
Sir Edward Fry,	*Justices of High Court, attached to Chancery Division.*
Sir E. E. Kay,	
Sir J. W. Chitty,	
Sir James Bacon,	*Chief Judge in Bankruptcy.*
Sir Henry James,	*Attorney-General.*
Sir F. Herschell,	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
472	17	mortgagees or	mortgagor or his
,,	19	mortgagor	mortgagee
484	9	*Evan & Moores*	*Evan Morris*
716	2 head-note	trial	action

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1882, will be as follows:—

In the First Series,
19 Ch. D.

In the Second Series,
8 Q. B. D. 7 P. D.

In the Third Series,
7 App. Cas.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aitken, Andrew *v.* – – –	175
Aldred's Estate, *In re* – –	228
Alexandra Palace Company, *In re* – – – – – –	149
Amor, *Ex parte*. *In re* Amor –	594
Anderson, Atkinson *v.* – –	100
——— *v.* Butler's Wharf Company. *In re* Butler's Wharf Company – – – –	131
Andrew *v.* Aitken – – –	175
Anglo-French Co-operative Society, *In re*. *Ex parte* Pelly	492
Artistic Colour Printing Company, *In re*. *Ex parte* Fourdrinier – – – – –	510
Atkinson *v.* Anderson – –	100
Attorney-General *v.* Shrewsbury (Kingsland) Bridge Company	752
——— *v.* Sidney Sussex College, Cambridge	514, n.

B.

	PAGE
Bank of England, Hyde (Corporation of) *v.* – – – –	176
Bannerman *v.* Young. *In re* Bannerman's Estate – –	105
Bannerman's Estate, *In re*. Bannerman *v.* Young – –	105
Barton (Local Board for), Robinson *v.* – – – –	621
Batty, Day *v.* – – –	830
Bennett, Rigby *v.* – – –	559
Bingley, Waite *v.* – – –	674
Bolland, *Ex parte*. *In re* Roper	543
Boosey, Chappell *v.* – –	232
Braby (F.) & Co.'s Applications, *In re*. *In re* Shropshire Iron Company's Trade-marks –	223
Braithwaite, *In re*. Braithwaite *v.* Wallis – – – –	121
——— *v.* Wallis. *In re* Braithwaite – – –	121

PAGE

Brocklebank, New London and Brazilian Bank *v.* – – 302
Brooke *v.* Edwards. *In re* Edwards – – – – 230
Brown *v.* Burdett – – – 667
——— *v.* Pearson – – – 716
Burdett, Brown *v.* – – – 667
Butler's Wharf Company, *In re.* Anderson *v.* Butler's Wharf Company – – – – 131
———————, Anderson *v.* *In re* Butler's Wharf Company – – – – 131
Buxton, Nottage. *In re* Knowles 806

C.

Cammell Company, Munster *v.* 183
Camoys (Lord), Tempest *v.* – 571
———————, ——— *v.* 576, n.
Capital Fire Insurance Association, *In re* – – – – 209
Chappell *v.* Boosey – – – 232
Clare *v.* Clare – – – 865
Clarke, *In re* – – – – 817
——— *v.* Palmer – – – 124
——— *v.* Skipper – – – 134
Clarke's (J.) Estate, *In re* – 776
——— Trusts, *In re* – – 748
Clowes, Martinson *v.* – – 857
Cocks, *Ex parte.* *In re* Poole – 397
Colchester (Mayor of), Prestney *v.* – – – – 111
Colman, Woolley *v.* – – 169
Colonial Mutual Life Assurance Society, *In re* – – – 837
Compton *v.* Preston – – 138
Cooper Hall & Co., Fraser *v.* – 718
Curtis *v.* Sheffield – – – 1

D.

Day *v.* Batty – – – – 830
——, Smith *v.* – – – 421
Dean, *In re.* Dean *v.* Wright – 581
——— *v.* Wright. *In re* Dean – 581
Dunlop, *In re.* Dunlop *v.* Dunlop 583
——— *v.* Dunlop. *In re* Dunlop 583

E.

PAGE

Edwards, *In re.* Brook *v.* Edwards – – – – 230
———, Brooke *v.* *In re* Edwards – – – – 230
Evans, *In re* – – – – 297
Exchange Banking Company, *In re.* Flitcroft's Case – – 519

F.

Flitcroft's Case. *In re* Exchange Banking Company – – 519
Fourdrinier, *Ex parte.* *In re* Artistic Colour Printing Company – – – – – 510
Frampton *v.* Stephens – – 164
Fraser *v.* Cooper Hall & Co. – 718

G.

Gartside *v.* Silkstone and Dodworth Coal and Iron Company 762
Gingell, Marshall *v.* – – 790
Glen *v.* Gregg – – – 513
Good, *Ex parte.* *In re* West – 868
Gray *v.* Webb – – – 802
Great Western (Forest of Dean) Coal Consumers' Company, *In re* – – – – – 769
Gregg, Glen *v.* – – – 513

H.

Hall Dare's Contract, *In re* – 41
Hanson, Hilliard *v.* – – 69
Harper, *Ex parte.* *In re* Tait – 537
Harrison, Cox-Walker & Co., United Telephone Company *v.* 720
Hart Davies, Hill *v.* – – 798
Harvey's Settled Estate, *In re* – 123
Hayman, *In re.* *Ex parte* Pratt 439
Henty *v.* Wrey – – – 332
Hewer, *In re.* *Ex parte* Kahen 871
Higgins and Hitchman's Contract, *In re* – – – – 95
Hill *v.* Hart Davies – – 798

PAGE

Hill *v.* Midland Railway Company – – – – – 143
Hilliard *v.* Hanson – – – 69
Hood *v.* Newby – – – 605
Huggins, *Ex parte.* *In re* Huggins – – – – – 85
Hurst *v.* Hurst – – – 278
Hutchinson's Trusts, *In re* – 811
Hyatt's Trusts, *In re* – – 846
Hyde (Corporation of) *v.* Bank of England – – – 176

J.

Jackson, *In re.* Jackson *v.* Talbot – – – – – 786
——— *v.* Talbot. *In re* Jackson – – – – – 786
Jones, Shepard *v.* – – – 469
Junior Army and Navy Stores, Maple & Co. *v.* – – – 369

K.

Kahen, *Ex parte.* *In re* Hewer 871
Kershaw, *In re* – – – 613
Kettlewell *v.* Watson – – 685
Kirk, *In re.* Kirk *v.* Kirk – 431
—— *v.* Kirk. *In re* Kirk – 431
—— *v.* Todd – – – – 484
Knight, *In re.* *Ex parte* Voisey 442
Knowles, *In re.* Nottage *v.* Buxton – – – – 806

L.

Lewis, London and County Banking Company *v.* – – 490
———, McHenry *v.* – – 202
——— *v.* Trask – – – 862
Linger, Tucker *v.* – – – 18
London and County Banking Company *v.* Lewis – – 490
Lonsdale, Walsh *v.* – – – 9
Luke *v.* Tonkin. *In re* Symons 757

M.

McAlpine *v.* Moore. *In re* Moore 778
McHenry *v.* Lewis – – – 202

PAGE

Machu, *In re* – – – – 838
Maclure, Yorkshire Railway Wagon Company *v.* – – 309
Maple & Co. *v.* Junior Army and Navy Stores – – – 369
Marshall *v.* Gingell – – 790
Martinson *v.* Clowes – – 857
Matthews, Wolfe *v.* – – 194
Mellor *v.* Swire. *In re* Swire – 647
Midland Railway Company, Hill *v.* – – – – – 143
Moir, *Ex parte.* *In re* Moir – 61
Moore, *In re.* McAlpine *v.* Moore 778
———, McAlpine *v.* *In re* Moore 778
Munster *v.* Cammell Company – 183

N.

Nerinckx, Van Gheluive *v.* – 189
New London and Brazilian Bank *v.* Brocklebank – – – 302
Newby, Hood *v.* – – – 605
Nottage *v.* Buxton. *In re* Knowles – – – – 806

O.

Oak Pits Colliery Company, *In re* 322
Ommanney, Robinson *v.* – – 780

P.

Palin, Thomas *v.* – – – 360
Palmer, Clarke *v.* – – – 124
Palmer's (J. B.) Application, *In re* – – – – – 47
Parker, *In re* – – – – 408
Pearson, Brown *v.* – – – 716
Pelly, *Ex parte.* *In re* Anglo-French Co-operative Society 492
Piller *v.* Roberts – – – 198
Pollock *v.* Rabbits – – – 466
Poole, *In re.* *Ex parte* Cocks – 397
———, Walker *v.* – – – 835
Popplewell, *Ex parte.* *In re* Storey – – – – 73
Pratt, *Ex parte.* *In re* Hayman 439
Prestney *v.* Colchester (Mayor of) 111
Preston, Compton *v.* – – 138
Price, *Ex parte.* *In re* Roberts – 553

Q.

PAGE

Quartz Hill, &c., Company, *In re*. *Ex parte* Young – – 642

R.

Rabbits, Pollock *v.* – – – 466
Reynolds, *Ex parte*. *In re* Reynolds – – – – 601
Rigby *v.* Bennett – – – 559
Roberts, *In re*. *Ex parte* Price 553
———, Piller *v.* – – – 198
Robinson *v.* Barton (Local Board for) – – – – – 621
——— *v.* Ommanney – – 780
Roper, *In re*. *Ex parte* Bolland 543

S.

Salaman, *Ex parte*. *In re* Taylor 394
Sheffield, Curtis *v.* – – – 1
Shepard *v.* Jones – – – 469
Shrewsbury (Kingsland) Bridge Company, Attorney-General *v.* 752
Shropshire Iron Company's Trade-marks, *In re*. *In re* F. Braby & Co.'s Applications – 223
Sidney Sussex College, Cambridge, Attorney-General *v.* 514, n.
Silkstone and Dodworth Coal and Iron Company, Gartside *v.* 762
Silver Valley Mines, *In re* – 381
Skipper, Clarke *v.* – – – 134
Smith *v.* Day – – – 421
———, Wallis *v.* – – – 243
Stephens, Frampton *v.* – – 164
Storey, *In re*. *Ex parte* Popplewell – – – – – 73
Sutton, *In re* – – – – 855
Swire, *In re*. Mellor *v.* Swire – 647
———, Mellor *v.* *In re* Swire – 647
Symons, *In re*. Luke *v.* Tonkin 757

T.

Tait, *In re*. *Ex parte* Harper – 537
Talbot, Jackson *v.* *In re* Jackson – – – – – – 786
Taylor, *In re*. *Ex parte* Salaman 394
Tempest *v.* Camoys (Lord) – 571

PAGE

Tempest *v.* Camoys (Lord) 576, n.
Thomas *v.* Palin – – – 360
Todd, Kirk *v.* – – – 484
Tonkin, Luke *v.* *In re* Symons 757
Trask, Lewis *v.* – – – 862
Tucker *v.* Linger – – – 18

U.

United Telephone Company *v.* Harrison, Cox-Walker & Co. – 720

V.

Van Gheluive *v.* Nerinckx – 189
Voisey, *Ex parte*. *In re* Knight 442

W.

Waite *v.* Bingley – – – 674
Wala Wynaad Indian Gold Mining Company, *In re* – – 849
Walker *v.* Poole – – – 835
Wallis, Braithwaite *v.* *In re* Braithwaite – – – 121
——— *v.* Smith – – – 243
Walsh *v.* Lonsdale – – – 9
Watson, Kettlewell *v.* – – 685
Weaver, *In re* – – – 615
Webb, Gray *v.* – – – 802
West, *In re*. *Ex parte* Good – 868
Whittaker, *In re*. Whittaker *v.* Whittaker – – – – 657
——— *v.* Whittaker. *In re* Whittaker – – – – 657
Wolfe *v.* Matthews – – – 194
Woolley *v.* Colman – – 169
Working Men's Mutual Society, *In re* – – – – – 831
Wrey, Henty *v.* – – – 332
Wright, Dean *v.* *In re* Dean – 581

Y.

Yorkshire Railway Wagon Company *v.* Maclure – – – 309
Young, *Ex parte*. *In re* Quartz Hill &c. Company – – 642
———, Bannerman *v.* *In re* Bannerman's Estate – – 105

TABLE OF CASES CITED.

A.

		PAGE
Aaronson, Ex parte	7 Ch. D. 713	597
Abadam *v.* Abadam	33 Beav. 475	107
Abrey *v.* Newman	16 Beav. 431	813
Adams' Settled Estates, In re	9 Ch. D. 116	123
Agar-Eilis, In re	10 Ch. D. 49	822
Agra Bank *v.* Barry	Law Rep. 7 H. L. 135	694
Alison's Trusts, In re	8 Ch. D. 1	652
Allan *v.* Backhouse	2 V. & B. 65	786
Allen *v.* Taylor	16 Ch. D. 355	564
Alt *v.* Gregory	8 D. M. & G. 221	813
Amos *v.* Chadwick	4 Ch. D. 869; 9 Ch. D. 459	204
Ancona *v.* Waddell	10 Ch. D. 157	282
Andrews *v.* Salt	Law Rep. 8 Ch. 622	818
Andrews' Settled Estates, In re	26 W. R. 811	124
Armitage, Ex parte	17 Ch. D. 13	553
Arrow *v.* Mellish	1 De G. & Sm. 355	812
Ash *v.* Dawnay	8 Ex. 237	71
Ashbury Railway Carriage and Iron Company *v.* Riche	Law Rep. 7 H. L. 653	531
Ashley, In re	1 Russ. & My. 371	617
Ashwell's Will, In re	Joh. 112	107
Ashworth *v.* Outram	5 Ch. D. 923	659
Askew *v.* Woodhead	14 Ch. D. 27	229
Astley *v.* Micklethwait	15 Ch. D. 59	793
——— *v.* Weldon	2 B. & P. 346	244
Athill, In re	16 Ch. D. 211	587
Atkyns *v.* Kinnier	4 Ex. 776	214
Attorney-General *v.* Aspinall	2 My. & Cr. 613	114
——— *v.* Birmingham Tame and Rea Drainage Board	17 Ch. D. 685	178, 486
——— *v.* Cockermouth Local Board	Law Rep. 18 Eq. 172	752
——— *v.* Dorking (Guardians of)	20 Ch. D. 595	486
——— *v.* Ely, Haddenham, and Sutton Railway Company	Law Rep. 4 Ch. 194	752
——— *v.* Great Eastern Railway Company	11 Ch. D. 449	752
——— *v.* Great Northern Railway Company	1 Dr. & Sm. 154	754

		PAGE
Attorney-General *v.* Heelis	2 S. & S. 67	114
——— *v.* Oxford, Worcester, and Wolverhampton Railway Company	2 W. R. 330	755
——— *v.* Shield	3 H. & N. 834; 28 L. J. (Ex.) 49	107
——— *v.* Sidney Sussex College	15 W. R. 162	513
——— for the Isle of Man *v.* Mylchreest	4 App. Cas. 294	23
Attwood *v.* Miller	Weekly Notes (1876) p. 11	140
Austin *v.* Austin	4 D. J. & S. 716	823
Averall *v.* Wade	Ll. & G. 252	590

B.

Back *v.* Hay	5 Ch. D. 235	135
Badger *v.* Shaw	29 L. J. (Q.B.) 73	873
Bailey *v.* Roberton	3 App. Cas. 1055	728
Bain *v.* Fothergill	Law Rep. 7 H. L. 158	99
Baker *v.* Portsmouth (Mayor of)	3 Ex. D. 3, 157	626
Ballard *v.* Marsden	14 Ch. D. 374	108
Banbury *v.* White	2 H. & C. 300	874
Barber *v.* Blaiberg	19 Ch. D. 473	140
——— *v.* Mackrell	12 Ch. D. 534	759
Bardwell *v.* Sheffield Waterworks Company	Law Rep. 14 Eq. 517	154
Barnett *v.* Blake	2 Dr. & Sm. 117	281
Barrack *v.* M'Culloch	3 K. & J. 110	660
Barret *v.* Barret	Hetley, 35	28
Barrett's Case (No. 2)	4 D. J. & S. 756	523
Bartholomew *v.* Meredith	1 Vern. 276	357
Baum, Ex parte	7 Ch. D. 719	401
Beauchamp (Lord) *v.* Great Western Railway Company	Law Rep. 3 Ch. 745	97
Beddall *v.* Maitland	17 Ch. D. 174	140, 176, 803
Beddow *v.* Beddow	9 Ch. D. 89	799
Beere *v.* Hoffmister	23 Beav. 101	333
Begley *v.* Cook	3 Drew. 662	813
Bell *v.* Wilson	2 Dr. & Sm. 395; Law Rep. 1 Ch. 303	23
Bellairs *v.* Bellairs	Law Rep. 18 Eq. 510	842
Benton, In re	19 Ch. D. 277	750
Berry *v.* Berry	7 Ch. D. 657	793
Bethell *v.* Abraham	Law Rep. 17 Eq. 24	575
Betts *v.* Burch	4 H. & N. 506	244
Billon *v.* Hyde	1 Ves. Sen. 327	851
Binney *v.* Ince Hall Coal and Cannel Company	35 L. J. (Ch.) 363	305
Bissel, In re	Law Rep. 6 Ch. 605	851
Blackmore *v.* Yates	Law Rep. 2 Ex. 225	311
Blair, In re	1 My. & Cr. 300	301
Bogue *v.* Houlston	5 De G. & Sm. 267	371
Bonham, In re	10 Ch. D. 595	851
Bordier *v.* Burrell	5 Ch. D. 512	135
Bouchard, Ex parte	12 Ch. D. 26	607
Boucicault *v.* Chatterton	5 Ch. D. 267	236
——— *v.* Delafield	1 H. & M. 597	236
Boursot *v.* Savage	Law Rep. 2 Eq. 134	695

		PAGE
Bowyer *v.* Griffin	Law Rep. 9 Eq. 340	862, 865
Boycot *v.* Cotton	1 Atk. 552	356
Boys *v.* Ancell	5 Bing. N. C. 390	247
Bradley *v.* Peixoto	3 Ves. 324	840
——— *v.* Riches	9 Ch. D. 189	304, 694
Bradshaw *v.* Lancashire and Yorkshire Railway Company	Law Rep. 10 C. P. 189	488
Brandon *v.* Brandon	7 D. M. & G. 365	1
——— *v.* Robinson	18 Ves. 429	840
Breton *v.* Woollven	17 Ch. D. 416	661
Breuen *v.* Breuen	2 Vern. 439; Prec. in Ch. 195	356
Bridgewater Engineering Company, In re	12 Ch. D. 181	324
Briggs *v.* Jones	Law Rep. 10 Eq. 92	128
Brignall *v.* Cohen	21 W. R. 25	873
British and American Telegraph Company *v.* Albion Bank	Law Rep. 7 Ex. 119	494
——— Seamless Paper Box Company, In re	17 Ch. D. 467	494
Brocas *v.* Lloyd	23 Beav. 129	834
Brooke, Ex parte	3 Ch. D. 494	523
——— *v.* Brooke	25 Beav. 342	659
——— *v.* Wigg	8 Ch. D. 510	135
Brophy *v.* Bellamy	Law Rep. 8 Ch. 798	575
Brotherton *v.* Hatt	2 Vern. 574	694
Brown, Ex parte	11 Ch. D. 148	555
———, Bayley, & Dixon, In re	18 Ch. D. 649	326
——— *v.* Whiteway	8 Hare, 145	793
Burdick *v.* Garrick	Law Rep. 5 Ch. 233	521
Bury's Case	5 Co. 98 b.	166
Bush *v.* Fox	Mac. Pat. Caf. 167	730
Butcher *v.* Jackson	14 Sim. 444	333
Bute (Marquis of) *v.* Cunynghame	2 Russ. 275	592
Butters, Ex parte	14 Ch. D. 265	555
Button *v.* O'Neill	4 C. P. D. 354	871

C.

Caledonian Railway Company *v.* Sprot	2 Macq. 449	563
Calvert *v.* Godfrey	6 Beav. 97	788
Camden (Marquis) *v.* Murray	16 Ch. D. 161	574
Carter, Ex parte	12 Ch. D. 908	549
——— *v.* Bletsoe	2 Vern. 617; Prec. in Ch. 267	356
Castro *v.* Murray	Law Rep. 10 Ex. 213	202
Catterina Chiazzare, The	1 P. D. 368	202
Cave *v.* Cave	15 Ch. D. 639	695
Chadwick *v.* Doleman	2 Vern. 527	335
Challinor, Ex parte	16 Ch. D. 260	549
Chandos (Duke of) *v.* Talbot	2 P. Wms. 601	354
Chasemore *v.* Richards	7 H. L. C. 349	566
Child, Ex parte	20 Ch. D. 126	644
Chilton *v.* London (Corporation of)	7 Ch. D. 735	115
Clark *v.* Gill	1 K. & J. 19	832
Clarke, Ex parte	Jac. 589	613
——— *v.* Bradlaugh	7 Q. B. D. 151	765
——— *v.* Cookson	2 Ch. D. 756	135
——— *v.* Law	2 K. & J. 28	642
Clarkson *v.* Henderson	14 Ch. D. 348	447

		PAGE
Clements *v.* Norris	26 W. R. 94	135
Coal Consumers Association, In re	4 Ch. D. 625	329
Cobb, Ex parte	Law Rep. 8 Ch. 727	401
Cobbet *v.* Woodward	Law Rep. 14 Eq. 407	369
Cobham *v.* Dalton	Law Rep. 10 Ch. 655	867
Cockerell *v.* Dickens	3 Moo. P. C. 98; 1 M. D. & D. 45	680
Cole *v.* Kernot	Law Rep. 7 Q. B. 534, n.	781
Collie, In re	3 Ch. D. 481	587
Collins, Ex parte	Law Rep. 10 Ch. 367	76
——— *v.* Godefroy	1 B. & Ad. 950	834
Collyer *v.* Isaacs	19 Ch. D. 342	782
Conelly *v.* Steer	7 Q. B. D. 520	546
Cooper, Ex parte	Law Rep. 10 Ch. 510	494
——— *v.* The Queen	14 Ch. D. 311	87
Cork and Youghal Railway Company, In re	Law Rep. 4 Ch. 748	311
Cory *v.* Eyre	1 D. J. & S. 149	304
Cotton *v.* Clark	16 Beav. 134	866
Coventry and Dixon's Case	14 Ch. D. 660	155, 492, 520
Cowper *v.* Scot	3 P. Wms. 119	357
Cox *v.* Mitchell	7 C. B. (N.S.) 55; 29 L. J. (C.P) 33	202
Cramer *v.* Bird	Law Rep. 6 Eq. 143	719
Crawford, Ex parte	28 L. T. (N.S.) 244	61
Creaton *v.* Creaton	3 Sm. & Giff. 386	790
Credit Company *v.* Pott	6 Q. B. D. 295	545
Credland *v.* Potter	Law Rep. 10 Ch. 8	693
Crickett *v.* Dolby	3 Ves. 10	662
Croft, In re	32 L. J. (Ch.) 481	298
Crosbie, Ex parte	7 Ch. D. 123	605
Crossley *v.* Beverley	1 Web. Pat. Cas. 112	728
——— *v.* Potter	Mac. Pat. Cas. 240	728
Croughton's Trusts, In re	8 Ch. D. 460	748
Cumberland *v.* Planché	1 Ad. & E. 580	240
Cundy, Ex parte	2 Rose, 357	394

D.

Dalton *v.* Angus	6 App. Cas. 740	563
Daly *v.* Daly	2 J. & Lat. 752	788
Darvill *v.* Roper	3 Drew. 294	23
Davies *v.* Huguenin	1 H. & M. 730	333
——— *v.* Penton	6 B. & C. 216	253
Davis *v.* Jenkins	3 V. & B. 151	118
Davis's Trusts, In re	19 W. R. 944	779
Dawkins *v.* Prince Edward of Saxe-Weimar	1 Q. B. D. 499	202
Dean *v.* Bennett	Law Rep. 6 Ch. 489	515
Delta, The	1 P. D. 393	202
Dent *v.* Dent	30 Beav. 363	788
Dickin, Ex parte	8 Ch. D. 377	555
Dillon (Lord) *v.* Alvares	4 Ves. 357	202
Dixon *v.* Barkshire	34 Beav. 537	808
D'Obree, Ex parte	8 Ves. 82	765
Dodkin *v.* Brunt	Law Rep. 6 Eq. 580	779
Doe *v.* Biggs	2 Taunt. 109	793

		PAGE
Doe *v.* Burlington (Earl of)	5 B. & Ad. 507	28
—— *v.* Claridge	6 C. B. 641	793
—— *v.* Eyre	3 C. B. 557; 5 C. B. 713	284
Doglioni *v.* Crispin	Law Rep. 1 H. L. 301	103
Doherty *v.* Allman	3 App. Cas. 709	28
Dolan *v.* Macdermot	Law Rep. 5 Eq. 60; 3 Ch. 676	115
Dommett *v.* Bedford	6 T. R. 684	841
Dowbiggin *v.* Trotter	20 W. R. 794	651
Downes *v.* Grazebrook	3 Mer. 200	857
Drake *v.* Trefusis	Law Rep. 10 Ch. 364	786
Dryden *v.* Foster	6 Beav. 146	202
——— *v.* Putney (Overseers of)	1 Ex. D. 223	626
Duckworth, In re	Law Rep. 2 Ch. 578	540
Duggan's Trusts, In re	Law Rep. 8 Eq. 697	856
Dundas *v.* Wolfe-Murray	1 H. & M. 425	659

E.

Eardley *v.* Granville	3 Ch. D. 826	33
Early, Re	2 Coop. t. Cott. 108	613
Eddel's Trusts, In re	Law Rep. 11 Eq. 559	793
Edgeworth *v.* Edgeworth	Beat. 328	334
Elliot *v.* North Eastern Railway Company	10 H. L. C. 333	564
Elliott *v.* Freeman	7 L. T. (N.S.) 715	874
Ellis *v.* Silber	Law Rep. 8 Ch. 83	554
Ellis' Trusts, In re	Law Rep. 17 Eq. 409	748
Emma Silver Mining Company *v.* Grant	17 Ch. D. 122	523
Emmanuel, Ex parte	17 Ch. D. 35	397
Englefield Colliery Company, In re	8 Ch. D. 388	494
Evan *v.* Avon (Corporation of)	29 Beav. 144	114
Evans *v.* Bagshaw	Law Rep. 8 Eq. 469; 5 Ch. 340	678
——— *v.* Carrington	2 D. F. & J. 481	166
——— *v.* Coventry	8 D. M. & G. 835	531
Evelyn *v.* Evelyn	2 P. Wms. 659	335
Exhall Coal Mining Company, In re	4 D. J. & S. 377	330

F.

Farrow *v.* Austin	18 Ch. D. 58	383
Fearon *v.* Desbrisay	14 Beav. 635	333
Ferrand *v.* Prentice	Amb. 273	122
Festing *v.* Allen	12 M. & W. 279	790
——— *v.* Taylor	3 B. & S. 217	107
Field *v.* Carnarvon Railway Company	Law Rep. 5 Eq. 190	146
Finch *v.* Hattersley	3 Russ. 345, n.	793
Firth, Ex parte	19 Ch. D. 419	546
Fitzgerald *v.* Chapman	1 Ch. D. 563	166
Fletcher *v.* Tayleur	17 C. B. 21	30
Ford *v.* Kettle	9 Q. B. D. 139	545
Forest of Dean Coal Mining Company, In re	10 Ch. D. 450	522
	13 Ch. D. 822	661
Fox *v.* Hawks	4 D. J. & S. 298	728
Foxwell *v.* Bostock	3 Mer. 29	122
Freeman *v.* Fairlie	Law Rep. 12 Eq. 169	787
Frith *v.* Cameron		

		PAGE
Frost, In re	Law Rep. 5 Ch. 699	298
—— *v.* Ward	2 D. J. & S. 70	651
Fuller *v.* Redman	26 Beav. 600	191
—— *v.* Sargeant	Weekly Notes (1882) p. 4	135

G.

Galloway *v.* London (Mayor of)	Law Rep. 1 H. L. 34	626
Galsworthy *v.* Strutt	1 Ex. 659	247
Gardnor *v.* Shaw	24 L. T. (N.S.) 319; 19 W. R. 753	874
Garmstone *v.* Gaunt	1 Coll. 577	787
Gellatly *v.* Commissioners of Sewers of the City of London	3 Ch. D. 610	202
George *v.* Milbanke	9 Ves. 190	699
German Mining Company, In re	4 D. M. & G. 19	311
Gibson, In re	Law Rep. 7 Ch. 52	619
—— *v.* Bott	7 Ves. 89	660
—— *v.* East India Company	5 Bing. N. C. 262	87
Gilbey, Ex parte	8 Ch. D. 248	607
Giles *v.* London, Chatham, and Dover Railway Company	1 Dr & Sm. 406	146
Gillett's Trusts, In re	W. N. (1876) p. 251	779
Gisborne *v.* Gisborne	2 App. Cas. 300	574, 615
Gledhill *v.* Hunter	14 Ch. D. 492	141
Glover *v.* Barlow	21 Ch. D. 788, n.	788
Good, Ex parte	5 Ch. D. 46	540
Goodman's Trusts, In re	17 Ch. D. 266	102
Grace *v.* Newman	Law Rep. 19 Eq. 623	371
Grant *v.* Grant	34 Beav. 623	659
Gray *v.* Lewis	Law Rep. 8 Ch. 1035	494
—— *v.* Warner	Law Rep. 16 Eq. 577	660
Great Western Railway Company *v.* Bennett	Law Rep. 2 H. L. 27	564
—— *v.* May	Law Rep. 7 H. L. 283	97
Greaves *v.* Keene	4 Ex. D. 73	231
Green *v.* Price	13 M. & W. 695	247
Grimes, In re	Ir. Rep. 11 Eq. 465	822
Grissell's Case	Law Rep. 1 Ch. 528	529
Guest *v.* Smythe	Law Rep. 5 Ch. 551	857

H.

Hadley *v.* Baxendale	9 Ex. 341	428
—— *v.* London Bank of Scotland	3 D. J. & S. 63	491
Halfhide *v.* Robinson	Law Rep. 9 Ch. 373	678
Hallifax *v.* Wilson	16 Ves. 168	808
Hambly *v.* Trott	Cowp. 371	488
Hamilton *v.* Chaine	7 Q. B. D. 1, 319	76, 546
Hampton *v.* Holman	5 Ch. D. 183	3
Hankin, Ex parte	Law Rep. 10 Ch. 267	607
Hardiman, In re	16 Ch. D. 360	678
Harding, Ex parte	Law Rep. 15 Eq. 223	873
Hardy *v.* Martin	1 Bro. C. C. 419, n.	259
Hargreaves' Trade-Mark, In re	11 Ch. D. 669	225
Harrison, Ex parte	18 Ch. D. 127	447

		PAGE
Harrison, Ex parte	13 Ch. D. 603	554
Hartnall, In re	5 De G. & Sm. 111	847
Harton *v.* Harton	7 T. R. 652	793
Hawker, Ex parte	Law Rep. 7 Ch. 214	87
Hawksworth *v.* Hawksworth	Law Rep. 6 Ch. 539	818
Hay's Case	Law Rep. 10 Ch. 593	495
Hemming *v.* Griffith	2 Giff. 403	333
Hewitt *v.* Loosemore	9 Hare, 449	127, 695
——— *v.* Nanson	7 W. R. 5	172
Hext *v.* Gill	Law Rep. 7 Ch. 699	22
Hibbert *v.* Cooke	1 S. & S. 552	788
Hill *v.* Evans	4 D. F. & J. 288	730
—— *v.* Hill	10 W. R. 400	818
—— *v.* Kirkwood	28 W. R. 358	545
—— *v.* Wilson	Law Rep. 8 Ch. 888	660
Hills *v.* Wirley	2 Atk. 605	435
Hinchinbroke (Lord) *v.* Seymour	1 Bro. C. C. 395	332
Hine *v.* Dodd	2 Atk. 275	695
Hinton *v.* Sparkes	Law Rep. 3 C. P. 161	250
Hoare's Case	30 Beav. 225	311
Hodgson *v.* Halford	11 Ch. D. 959	290
Hodson *v.* Ball	1 Ph. 177	759
——— *v.* Mochi	8 Ch. D. 569	140
——— *v.* Tea Company	14 Ch. D. 859	494
Hollingsworth *v.* White	10 W. R. 619	874
Holloway *v.* Cheston	19 Ch. D. 516	131
Holme *v.* Guy	5 Ch. D. 901	515
Holmes *v.* Newcastle-upon-Tyne Freehold Abattoir Company	1 Ch. D. 682	154
Hoole *v.* Great Western Railway Company	Law Rep. 3 Ch. 262	719
Hopkins *v.* Swansea (Mayor of)	4 M. & W. 621; 8 M. & W. 901	114
Hornby *v.* Cardwell	8 Q. B. D. 329	200
Horner *v.* Flintoff	9 M. & W. 678	253
Hotten *v.* Arthur	1 H. & M. 603	371
Household Coal and Iron Company *v.* Neilson	1 Web. Pat. Cas. 673	727
Howard *v.* Bank of England	Law Rep. 19 Eq. 295	179
——— *v.* Digby	2 Cl. & F. 634	619
Huggins *v.* York Buildings Company	2 Atk. 44	203
Hughes *v.* Lewis	Joh. 696	363
Humfrey *v.* Humfrey	2 Dr. & Sm. 49	659
Hurst *v.* Hurst	16 Beav. 372	172
Hutton *v.* Warren	1 M. & W. 466	23

I.

Innes *v.* East India Company	17 C. B. 351	87

J.

Jackson, Ex parte	14 Ch. D. 725	443
——— *v.* Dover	2 H. & M. 209	806
——— *v.* Noble	2 Keen, 590	290
Jefferys *v.* Boosey	4 H. L. C. 815	236

		PAGE
Jelley, Son, & Jones, In re	Sebas. Digest of Trade Mark Cases, No. 616	225
Jennings *v.* Moore	2 Vern. 609	694
Job *v.* Job	6 Ch. D. 562	757
Joel *v.* Mills	3 K. & J. 458	841
Joint Stock Discount Company *v.* Brown	Law Rep. 8 Eq. 381	524
Jones *v.* Chappell	Law Rep. 20 Eq. 539	29
—— *v.* Smith	1 Hare, 43	694
Joy *v.* Campbell	1 Sch. & Lef. 328	874

K.

Keily *v.* Keily	4 D. & War. 38; 2 Con. & Law 334	333, 334
Kelly *v.* Morris	Law Rep. 1 Eq. 697	371
Kemble *v.* Farren	6 Bing. 141	244
Kemp, Ex parte	42 L. J. (Banky) 26	540
—— *v.* Waddingham	Law Rep. 1 Q. B. 355	191
Kennedy *v.* Green	3 My. & K. 699	686
Kenrick *v.* Beauclerk (Lord)	3 B. & P. 175	796
Kerr *v.* Preston (Corporation of)	6 Ch. D. 463	626
Kiallmark *v.* Kiallmark	26 L. J. (Ch.) 1	841
King of Hanover *v.* Bank of England	Law Rep. 8 Eq. 350	178
Knox *v.* Gye	Law Rep. 5 H. L. 656	522

L.

Lacey, Ex parte	6 Ves. 625	857
Lamb *v.* Bruce	24 W. R. 645	874
Laming *v.* Gee	10 Ch. D. 715	759
Landon *v.* Ferguson	3 Russ. 349	192
Lanesborough (Earl of), Re	Ll. & G. temp. Plunkett, 503	298
Lang *v.* Gisborne	31 Beav. 133	727
Langdale (Lady) *v.* Briggs	8 D. M. & G. 391	3
Layard *v.* Maud	Law Rep. 4 Eq. 397	128
Lea *v.* Whitaker	Law Rep. 8 C. P. 70	247
Lechmere and Lloyd, In re	18 Ch. D. 524	793
Lee *v.* Clutton	45 L. J. (Ch.) 43; 46 L. J. (Ch) 48	696
Leech *v.* Schweder	22 W. R. 292	135
Leigh's Estate, In re	Law Rep. 6 Ch. 887	229
Le Neve *v.* Le Neve	1 Amb. 436	693
Leonino *v.* Leonino	10 Ch. D. 460	587
Lethbridge *v.* Thurlow	15 Beav. 334	107
Lewis *v.* Fullarton	2 Beav. 6	371
—— *v.* Trask	21 Ch. D. 862	866
Linoleum Manufacturing Company *v.* Nairn	7 Ch. D. 834	49
Llynvi Company *v.* Brogden	Law Rep. 11 Eq. 188	29
London and County Banking Company *v.* Dover	11 Ch. D. 204	172
Lovat (Lord) *v.* Leeds (Duchess of)	2 Dr. & Sm. 62	105
Lovell *v.* Newton	4 C. P. D. 7	659
Lowndes *v.* Lowndes	15 Ves. 301	660
Lumsden *v.* Winter	8 Q. B. D. 650	176
Lundy Granite Company, In re	Law Rep. 6 Ch. 462	324

		PAGE
Lyde *v.* Mynn	1 My. & K. 683	782
Lysaght, In re	Sebas. Digest of Trade Mark Cases, No. 623	225

M.

MacAllister *v.* Rochester (Bishop of)	5 C. P. D. 194	200
Macdonald *v.* Carington	4 C. P. D. 28	803
Macdougall *v.* Jersey Imperial Hotel Company	2 H. & M. 528	155
Macfarlane, In re	2 J. & H. 673	619
M'George, Ex parte	20 Ch. D. 697	395
McKay's Case	2 Ch. D. 1	499
McMahon *v.* Field	7 Q. B. D. 591	30
Macoubrey *v.* Jones	2 K. & J. 684	335
M'Queen *v.* Farquhar	11 Ves. 467	333
Magee *v.* Lavell	Law Rep. 9 C. P. 107	244
Mali Ivo, The	Law Rep. 2 A. & E. 356	202
Mammoth Copperopolis of Utah, In re	50 L. J. (Ch.) 11	150
Manchester, Sheffield, and Lincolnshire Railway Company *v.* Brooks	2 Ex. D. 243	140
Manning *v.* Chambers	1 De G. & Sm. 282	282
Marlow *v.* Pitfeild	1 P. Wms. 558	315
Marner *v.* Bright	11 Ch. D. 394, n.	199
Marples *v.* Hartley	30 L. J. (Q. B.) 92	874
Massam *v.* Thorley's Cattle Food Company	W. N. (1879) 181	643
Mayer *v.* Murray	8 Ch. D. 424	757
Meades, In re	Ir. Rep. 5 Eq. 98	822
Metropolitan District Railway Company and Cosh, In re	13 Ch. D. 607	97, 145
Meyrick's Charity, In re	1 Jur. (N.S.) 438	515
Mid Kent Railway Act, In re	Joh. 387	793
Midland Railway Company *v.* Checkley	Law Rep. 4 Eq. 19	23
Milroy *v.* Lord	4 D. F. & J. 264	661
Mitcalfe *v.* Hanson	Law Rep. 1 H. L. 242	782
Moone *v.* Rose	Law Rep. 4 Q. B. 486	231
Moore *v.* Moore	Law Rep. 18 Eq. 474	661
Morton *v.* Woods	Law Rep. 3 Q. B. 658; 4 Q. B. 293	448, 452
Mulliner *v.* Midland Railway Company	11 Ch. D. 611	97
Murray *v.* Bogue	1 Drew. 353	372
——— *v.* Elliston	5 B. & A. 657	241

N.

Nalty *v.* Aylett	43 L. J. (Ch.) 721; 30 L. T. (N.S.) 763; 22 W. R. 857; Seton, pp. 634, 1594, 1596	231
Nash *v.* Eads	25 Sol. J. 95	860
National Funds Assurance Company, In re	10 Ch. D. 118	154, 520
National Insurance and Investment Association *v.* Carstairs	9 Jur. (N.S.) 955	644
National Mercantile Bank, Ex parte	15 Ch. D. 42	545
Neilson *v.* Betts	Law Rep. 5 H. L. 1	730
Newall and Elliot, In re	4 C. B. (N.S.) 269	728
Newby *v.* Harrison	3 D. F. & J. 287	423

		PAGE
Newcomen *v.* Coulson	7 Ch. D. 764	423
Newman, In re	4 Ch. D. 724	244
Newton *v.* Harland	9 Dowl. 16	832
North Yorkshire Iron Company, In re	7 Ch. D. 661	327
Novello *v.* James	5 D. M. & G. 876	429
Nurton *v.* Dickson	5 H. & N. 637	410

O.

Oke *v.* Heath	1 Ves. Sen. 135	435
O'Mahoney *v.* Burdett	Law Rep. 7 H. L. 388	294
Original Hartlepool Collieries Company *v.* Gibb	5 Ch. D. 713	485
Orr Ewing & Co. *v.* Johnston & Co.	13 Ch. D. 434	225
Osborne, In re	25 Beav 353	410
Ostell *v.* Lepage	5 De G. & Sm. 95; 2 D. M. & G. 892	202

P.

Padwick *v.* Scott	2 Ch. D. 736	803
Page, Ex parte	2 Ch. D. 323	406
Pannell, Ex parte	6 Ch. D. 335	554
Parker *v.* McKenna	Law Rep. 10 Ch. 96	521
Paterson, Ex parte	1 Rose, 402	394
Peacock *v.* Eastland	Law Rep. 10 Eq. 17	282
Pearson *v.* Dolman	Law Rep. 3 Eq. 315	842
Pearson's Case	5 Ch. D. 336	499
Pellas *v.* Neptune Marine Insurance Company	28 W. R. 405	803
Pelly, Ex parte	21 Ch. D. 492	529
Penn *v.* Bibby	Law Rep. 2 Ch. 127	728
Perfect *v.* Curzon (Lord)	5 Madd. 442	807
Perry-Herrick *v.* Attwood	25 Beav. 205; 2 De G. & J. 21	124
Peto *v.* Gardner	2 Y. & C. (Ch.) 312	788
—— *v.* Hammond	30 Beav. 495	695
—— *v.* ——	29 Beav. 91	696
Phillips *v.* Phillips	4 D. F. & J. 208	695
Phipps *v.* Annesley	2 Atk. 57	122
Pickford *v.* Hunter	5 Sim. 122	203
Pike *v.* Dickinson	21 W. R. 862	643
Pinchin *v.* London and North Western Railway Company	5 D. M. & G. 851	145
Playfair *v.* Cooper	17 Beav. 187	107
Plimpton *v.* Malcolmson	3 Ch. D. 531	727
—— *v.* Spiller	6 Ch. D. 412	727
Popplewell *v.* Hodkinson	Law Rep. 4 Ex. 248	562
Portland (Duke of) *v.* Topham	11 H. L. C. 32	333
Poulet (Lady) *v.* Poulet (Lord)	1 Vern. 204	335
Pound *v.* Plumstead Board of Works	Law Rep. 7 Q. B. 183	626
Powell *v.* Weeks	Noy's Rep. 108	166
Price *v.* Green	16 M. & W. 346	781
Princess of Reuss *v.* Bos	Law Rep. 5 H. L. 176	209
Progress Assurance Company, In re	Law Rep. 9 Eq. 370	326
Provident Permanent Building Society *v.* Greenhill	9 Ch. D. 122	447

		PAGE
Prudential Assurance Company *v.* Knott	Law Rep. 10 Ch. 142	799
Pulbrook *v.* Richmond Consolidated Mining Company	9 Ch. D. 610	185
Punnett, Ex parte	16 Ch. D. 226	447

Q.

Queensberry Case	1 Bli. 339	343
Quilter, Ex parte	30 W. R. 739	607

R.

Raggett *v.* Findlater	Law Rep. 17 Eq. 29	49
Ratcliffe *v.* Barnard	Law Rep. 6 Ch. 652	700
Rawlinson *v.* Clarke	14 M. & W. 187	254
Reg. *v.* Fullford	Leigh & Cave, C. C. R. 403; 33 L. J. (M. C.) 122	626
Regent United Service Stores, In re	8 Ch. D. 616	330
Reilly *v.* Jones	1 Bing. 302	247
Remnant *v.* Hood	2 D. F. & J. 396	334
Rex *v.* Davie	6 A. & E. 374	114
Reynolds *v.* Bridge	6 E. & B. 528	254
Rhodes *v.* Barret	Law Rep. 12 Eq. 479	648
Rice *v.* Rice	2 Drew. 73	128, 697
Richards *v.* Delbridge	Law Rep. 18 Eq. 11	661
——— *v.* James	Law Rep. 2 Q. B. 285	510
Rigby *v.* Connol	14 Ch. D. 482	195
Riley *v.* Garnett	3 De G. & Sm. 629	793
Rimell, Ex parte	1 D. M. & G. 491	441
Rivers (Earl) *v.* Derby (Earl)	2 Vern. 72	355
Roach *v.* Trood	3 Ch. D. 429	333
Robertson *v.* Norris	1 Giff. 421	857
Robinson *v.* Wood	27 L. J. (Ch.) 726	285
Rochford *v.* Hackman	9 Hare, 475	282, 842
Rolland *v.* Hart	Law Rep. 6 Ch. 678	694
Rolph, Ex parte	19 Ch. D. 98	546
Rosse (Earl of) *v.* Wainman	14 M. & W. 859	32
Russell *v.* Smith	15 Sim. 181	236

S.

Sadler *v.* Rickards	4 K. & J. 302	107
St. Nazaire Company, In re	12 Ch. D. 88	759
St. Thomas' Dock Company, In re	2 Ch. D. 116	769
Sainter *v.* Ferguson	7 C. B. 716	254
Salisbury (Marquis of) *v.* Gladstone	9 H. L. C. 692	23
Salvin *v.* North Brancepeth Coal Company	Law Rep. 9 Ch. 705	135
Samuel *v.* Jones	2 Hare, 246	866
——— *v.* Samuel	12 Ch. D. 152	282
Sanderson's Trust, In re	3 K. & J. 497	617
Sandon *v.* Hooper	6 Beav. 246; 14 L. J. (Ch.) 120	469
Sawyer *v.* Paddington (Vestry of)	Law Rep. 6 Q. B. 164	626
Seal *v.* Claridge	7 Q. B. D. 516	545
Seixo *v.* Provezende	Law Rep. 1 Ch. 192	225

		PAGE
Sharpe *v.* Birch	8 Q. B. D. 111	545
Shaw *v.* Jersey (Earl of)	4 C. P. D. 120	12
Shelley's Case	1 Co. Rep. 93 b.	795
Shropshire Union Railways and Canal Company *v.* The Queen	Law Rep. 7 H. L. 496	304
Silkstone and Dodworth Coal and Iron Company, In re	17 Ch. D. 158	327
Skinner *v.* Orde	Law Rep. 4 P. C. 60	822
Skinners' Company *v.* Irish Society	7 Beav. 593; 12 Cl. & F. 425	115
Skottowe *v.* Young	Law Rep. 11 Eq. 474	102
Slanning *v.* Style	3 P. Wms. 334	659
Smirthwaite's Trusts, In re	Law Rep. 11 Eq. 251	779
Smith *v.* Dale	18 Ch. D. 516	866
—— *v.* Evans	28 Beav. 59	695
—— *v.* Smith	2 Vern. 92	356
—— *v.* Streatfield	1 Mer. 358	812
Smyth's Settlement, In re	4 De G. & Sm. 499	178
Soames' Patent	1 Web. Pat. Cas. 726	727
Society of Practical Knowledge *v.* Abbott	2 Beav. 559	532
Solomon, Ex parte	20 Ch. D. 281	597
Soper, Ex parte	2 Mont. & A. 55	541
South Kensington Co-operative Stores, In re	17 Ch. D. 161	327
Southam, Ex parte	Law Rep. 17 Eq. 578	76
Sparrow *v.* Paris	7 H. & N. 594	254
Spawforth's Settlement, In re	12 W. R. 978; 10 L. T. (N.S.) 641	847
Spence *v.* Spence	12 C. B. (N.S.) 199	793
Spiller *v.* Spiller	3 Sw. 556	491
Stackhouse *v.* Jersey (Countess of)	1 J. & H. 721	129
Stannard *v.* Lee	Law Rep. 6 Ch. 346	372
Stansfield *v.* Cubitt	27 L. J. (Ch.) 266	873
Steel *v.* Rorke	1 B. & P. 307	190
Stent *v.* Robinson	12 Ves. 461	662
Stevens *v.* Morson	26 Sol. J. 25	660
Stockton Iron Furnace Company, In re	10 Ch. D. 335	443
—— Malleable Iron Company, In re	2 Ch. D. 101	587
Stoner *v.* Todd	4 Ch. D. 58	728
Stourton *v.* Stourton	8 D. M. & G. 760	822
Strickland, In re	Law Rep. 6 Ch. 226	298
Stringer's Case	Law Rep. 4 Ch. 475	150, 499
Sugg *v.* Silber	1 Q. B. D. 362	135
Sumpter *v.* Cooper	2 B. & Ad. 223	693
Swabey *v.* Goldie	1 Ch. D. 380	813
Swallow *v.* Binns	1 K. & J. 417	808
Swansborough *v.* Coventry	9 Bing. 305	564
Swindell *v.* Birmingham Syndicate	3 Ch. D. 127	135
Sykes' Trusts, Re	2 J. & H. 415	643

T.

Talbot *v.* Kemshead	4 K. & J. 93	281
Talbot *v.* Shrewsbury (Earl of)	4 My. & Cr. 672	822
Tanqueray-Willaume & Landau, In re	20 Ch. D. 465	795
Taylor *v.* Batten	4 Q. B. D. 85	835
—— *v.* Grange	13 Ch. D. 223; 15 Ch. D. 165	678
—— *v.* Horde	1 Burr. 60	765

		PAGE
Tennant *v.* Trenchard	Law Rep. 4 Ch. 537	858
Teynham (Lord) *v.* Webb	2 Ves. Sen. 197	335
Thomas *v.* Patent Lionite Company	17 Ch. D. 250	329
——— *v.* Williams	14 Ch. D. 864	799
Thompson *v.* Cohen	Law Rep. 7 Q. B. 527	781
——— *v.* Hudson	Law Rep. 4 H. L. 1	247
Thorley's Cattle Food Company *v.* Massam	6 Ch. D. 582	799
Thorpe *v.* Holdsworth	Law Rep. 7 Eq. 139	129
Threlfall, In re	16 Ch. D. 274	447
Tipton Green Colliery Company *v.* Tipton Moat Colliery Company	7 Ch. D. 192	474
Torres *v.* Franco	1 Russ. & My. 649	808
Tournay *v.* Tournay	Prec. in Ch. 290	356
Townson *v.* Tickell	3 B. & A. 31	282
Traders North Staffordshire Carrying Company, In re	Law Rep. 19 Eq. 60	329
Trappes *v.* Meredith	Law Rep. 9 Eq. 229; 7 Ch. 248	282
Trent *v.* Hunt	9 Ex. 14	12
—— and Humber Company, In re	Law Rep. 6 Eq. 396, 400, n.	522
Trulock *v.* Robey	15 Sim. 265	472
Turner, In re	12 W. R. 337	189
———, Re	2 Dr. & Sm. 501	659
——— *v.* Hancock	20 Ch. D. 303	383
——— *v.* Mullineux	1 J. & H. 334	107
——— *v.* ———	9 W. R. 252	863
——— *v.* Whittaker	23 Beav. 196	815
Turquand *v.* Marshall	Law Rep. 6 Eq. 112; 4 Ch. 376	522
Twycross *v.* Grant	4 C. P. D. 40	488

U.

Union Bank of London *v.* Ingram	20 Ch. D. 463; 5 H. L. C. 505; 2 Web. Pat. Cas. 216	172
Unwin *v.* Heath		728
Uruguay Central and Hygueritas Railway Company of Monte Video, In re	11 Ch. D. 372	772

V.

Vagg *v.* Shippey	1 Charley's New Practice Cases, 8	289

W.

Waldron *v.* Boulter	22 Beav. 284	813
Waldron *v.* Sloper	1 Drew. 193	129
Wall *v.* Wall	15 Sim. 513	107
Wallace *v.* Attorney-General	Law Rep. 1 Ch. 1	102
Walmsley *v.* Foxhall	1 D. J. & S. 451	1
Walters *v.* Morgan	3 D. F. & J. 718	252
Warner *v.* Jacob	20 Ch. D. 220	857
Warr *v.* Warr	Prec. in Ch. 213	356
Warriner *v.* Rogers	Law Rep. 16 Eq. 340	661

		PAGE
Waterhouse *v.* Jamieson	Law Rep. 2 H. L., Sc. 29	532
Watson *v.* Cave	17 Ch. D. 19	202, 719
——— *v.* Row	Law Rep. 18 Eq. 680	866
Wayn *v.* Lewis	1 Drew. 487	171
Webb *v.* Grace	2 Ph. 701	841
——— *v.* Shaftesbury (Earl of)	7 Ves. 480	578
Wedderburn *v.* Pickering	13 Ch. D. 769	135
Wellesley *v.* Mornington (Earl of)	2 K. & J. 143	333
Wells *v.* Foster	8 M. & W. 149	87
West *v.* Reid	2 Hare, 249	695
——— *v.* White	4 Ch. D. 631	135
Western of Canada Oil Lands and Works Company, In re	Law Rep. 17 Eq. 1	772
Wheeldon *v.* Burrows	12 Ch. D. 31	564
Whitbread, Ex parte	2 Mer. 99	298
Whitcomb *v.* Minchin	5 Madd. 91	857
Whitehouse & Co., In re	9 Ch. D. 595	495
Wicks, Ex parte	17 Ch. D. 70	87
Wigg *v.* Wigg	1 Atk. 382	435
Willes *v.* Douglas	10 Beav. 47	812
Williams, Ex parte	7 Ch. D. 138	443
Williamson, Ex parte	Law Rep. 5 Ch. 309	311
Willingale *v.* Maitland	Law Rep. 3 Eq. 103	178
Wills *v.* Wills	Law Rep. 20 Eq. 342	812
Wilson, Ex parte	1 M. D. & D. 586	540
——— *v.* Church	9 Ch. D. 552	719
——— *v.* Ferrand	Law Rep. 13 Eq. 362	202
Wiltshire *v.* Marshall	W. N. (1866), p. 80	832
Wolfe, Ex parte	44 L. T. (N.S.) 321	875
Wood *v.* Hamblet	6 Ch. D. 113	135
Woodward *v.* Woodward	3 D. J. & S. 672	659
Worthington *v.* Morgan	16 Sim. 547	128, 695
Wyllie *v.* Pollen	3 D. J. & S. 596	694

X.

Xenos *v.* Wickham	Law Rep. 2 H. L. 296	766

Y.

Yates *v.* Phettiplace	2 Vern. 416	356
Yorkshire Railway Waggon Company *v.* Maclure	19 Ch. D. 478	155
——— *v.* Newport and Abercarne Coal Company	5 Q. B. D. 268	200

Z.

Zambaco *v.* Cassavetti	Law Rep. 11 Eq. 439	648

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

CURTIS *v.* SHEFFIELD.

C. A.
1882
March 8.

Practice—Appeal after Time—Appeal from Decree declaring Future Rights.

A testator gave, after the death of his wife, a legacy to his son *E. S.* for life and after his death to his children, and if he died without issue it was to be divided among the testator's "surviving children." Six other legacies were given in a similar way. All the seven children survived the testator. A suit for administration was instituted, to which all were parties. In 1836 an order on further consideration was made, at which time six of the children were living, and it was declared, that on the death of the widow, *E. S.* would become entitled to the interest on the legacy for life, that on his death it would be divisible among his children then living, but if he died without leaving issue, then among the children of the testator who were living at the testator's decease. The testator's widow died in 1838, and *E. S.* died in 1881 without ever having had a child. At this time one child only of the testator was living, and he applied for leave to appeal against the order of 1836, on the ground that it was irregular in making a prospective declaration as to future rights:—

Held, that leave to appeal ought not to be granted, the fact that a declaration was made as to future rights being no sufficient reason for giving such leave in a case where all parties who could in any event be interested were before the Court and adult when the declaration was made.

Brandon v. *Brandon* (1) and *Walmsley* v. *Foxhall* (2) considered and distinguished.

Observations on the change of opinion in the Legislature and the Judges as to the period during which orders should be appealable.

JOSEPH SHEFFIELD died in July, 1831, having made his will, dated the 22nd of July, 1830, the general scheme of which

(1) 7 D. M. & G. 365. (2) 1 D. J. & S. 451.

C. A. 1882 — CURTIS v. SHEFFIELD.

was to distribute the bulk of his personal estate among his seven children named in his will and their children, £5000 Bank Annuities being given to each son and his children, and £3000 to each daughter and her children, a life interest being first given to the testator's wife. The £5000 provided for the testator's son *Edward Sheffield* was given in these terms:

"I leave to my son *Edward Sheffield*, after the decease of my wife *Catherine Sheffield*, the interest of £5000 in the £3 per cent. Consols or Reduced, so that my son may receive the interest as it becomes due, and after his death the principal to be equally divided among his surviving children, and no entail to be cut off in any way whatever, and should he die without issue, all his share to be equally divided among my surviving children."

Similar dispositions were made of the other legacies.

The testator left his wife and the seven children named in his will surviving him. A decree for administration of his estate was made on the 23rd of November, 1833, the widow and all the children being parties.

By an order made on the 16th of July, 1836, on the hearing of the cause for further directions, it was, amongst other things, declared that on the decease of *Catherine Sheffield* the defendant *Edward Sheffield* would become entitled to the dividends on the sum of £5000 £3 per cent. Consols or Reduced Annuities for his life, and that upon his decease the principal of such stock would be divisible in equal shares amongst his children who should be living at the time of his death as tenants in common, and that in case he should die without leaving issue, then that the same would be divisible in equal shares amongst the children of the testator who were living at the testator's decease. At the time when this order was made six of the seven children of the testator were living, one daughter having died since the decree. There were similar declarations as to the other legacies.

Catherine Sheffield died in 1838, and on her death the legacies were carried over to separate accounts, the sum of £2500 Consols and £2500 Reduced Annuities being carried over to the account of *Edward Sheffield* his life interest, with a direction to pay the income to him for life, and with liberty to apply on his death.

Edward Sheffield died on the 23rd of November, 1881, without ever having had a child. The only child of the testator living at the decease of *Edward Sheffield* was *Henry Sheffield.*

Henry Sheffield now applied for leave to appeal against so much of the order on further directions as declared that on the death of *Edward Sheffield* without issue his £5000 stock would be divisible in equal shares among the children of the testator who were living at the testator's decease.

J. Pearson, Q.C., and *Henderson,* for the application:—

It is against the practice of the Court to make a declaration as to future rights unless there is something to be done at once which makes it necessary to determine them, and where such a decree has been inadvertently made, leave will be given to appeal after time: *Brandon* v. *Brandon* (1); *Walmsley* v. *Foxhall* (2). In *Lady Langdale* v. *Briggs* (3) the Court grounds the rule on want of jurisdiction; it may also be put on this, that in most cases such a question cannot be fairly argued, since it is impossible for any one to know which way his interest lies. *Hampton* v. *Holman* (4) affirms the rule against declaring future rights. Leave, therefore, should be given to appeal.

Cozens-Hardy, Q.C., and *Jason Smith,* and *E. Cutler,* for the Respondents, were not called upon.

JESSEL, M.R.:—

This is an application to the discretion of the Court under circumstances which I should think never occurred before. In 1836 Vice-Chancellor *Shadwell* made seven declarations of right as to seven legacies given by the will of the testator. He declared the rights of the parties entitled to present interests, and also their rights in the future after the deaths of the various tenants for life. Those declarations were made in the presence of all the children of the testator who were then living—they appear to have been of age, and they appeared by counsel and argued the various questions which were decided by the Court. Now it is

(1) 7 D. M. & G. 365.
(2) 1 D. J. & S. 451.
(3) 8 D. M. & G. 391.
(4) 5 Ch. D. 183.

C. A. 1882 CURTIS v. SHEFFIELD. Jessel, M.R.

true that it is not the practice of the Court, and was not the practice of the Court of Chancery, to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decisions, or there are some other special circumstances to satisfy the Court that it is desirable at once to decide on the future rights. But where all the parties who in any event will be entitled to the property are of age and are ready to argue the case, the reason of the rule departs, and it becomes a bare technicality. The reason of the rule is this, that the Court will not decide on future rights, because until the event happens it does not know who may be interested in arguing the question, and therefore may be shutting out parties who, when the event happens, may be entitled to succeed, but where they are all of age, and every possible party is represented before the Court, as I said before, utility seems to say that there should be a power to determine their rights, as is the case in *Scotland* and in many other countries.

In the present case there may have been special circumstances which made the Court think it desirable to decide the question at once. I cannot tell whether there were, but I think that probably there were not, because I know that the practice of the Vice-Chancellor *Shadwell* was frequently to disregard the rule or practice of the Court of Chancery in this respect, and to make declarations in this form at the request of the parties. In the present instance, as I said before, there is no objection to it except the technical rule; the number of parties entitled could on one view of the construction diminish, but could not in any view increase, and they were all there. At the same time I am not at liberty to say that there were not special circumstances. The declarations were made forty-six years ago, and probably nobody knows anything about what took place then, so there may have been special circumstances. I cannot say, on the face of this decree, without knowing more about it, that it was not warranted. At most, there was only an irregularity, and whether there was an irregularity or not I do not actually know.

The next point, and as it seems to me the most serious point, is this, at what time are people entitled to rely upon the judgment of a competent tribunal as to their rights and interests in

property. Upon that question there has been a great change of opinion in modern times. In modern times it has been considered that there is nothing more important than that people's rights when ascertained by the judgment of a competent tribunal, if questioned, should be questioned within a very short period. I cannot give a better illustration of this than by referring to the change in the orders and rules of the Court. For a very long time there was no limit as to the time within which a rehearing could be had. Then the practice sprang up of not allowing a rehearing after twenty years unless there were special grounds. After some years, the General Order of the 7th of August, 1852, cut down the twenty years to five years, shewing the vast change in opinion as to what was right to be done in such cases. Then after a lapse of about twenty years came the Judicature Acts, the Rules under which cut down the period from five years to one year, shewing again that opinion had changed in the direction I have mentioned. Now, therefore, the rights of the parties are settled at the end of one year except under special circumstances.

There has been a change of opinion also as to what are sufficient special circumstances. In former days, when the time allowed for appealing was very long, the Judges were rather more ready to listen to a request for rehearing when the period had expired than they will be now, and circumstances were allowed to be considered special which probably would not now be so considered.

The recent decisions as to special circumstances excepting the Appellant from the obligation to appeal within one year, have been very stringent; I need not refer to them, because everybody knows them, and they all lay down this principle, that as a general rule an appeal after the time will not be allowed unless the Respondent has done something to give a sort of equity to the Appellant to go beyond the period. So that not only has opinion varied as to the period of the appeal, but opinion has varied as to the grounds upon which the appeal should be allowed after time, and in that respect also the rules have become more stringent. I say this, because I shall have a word or two to say about the authorities cited to shew that they are not now necessarily binding on the Court, having regard to the change in legislation and the change in opinion in these matters.

C. A. 1882 CURTIS v. SHEFFIELD. Jessel, M.R.

We have then to consider what the case made by the Appellant is. He says that the decree was irregular at the time it was made on the technical ground I have mentioned, and that it was erroneous. But how erroneous? Erroneous, because the Court gave the wrong meaning to the word "survivor." That is, he alleges the decree to be erroneous on a question of construction which has perhaps caused more difference of opinion amongst Judges than the construction of any other word in the English language. It has been said over and over again, that there is no hard and fast rule as to the meaning to be given to that word—it is a question of the construction of the whole will, which I understand in this case was a long one. I have not seen it, but it may well be that there is something else to be found in that will which may have induced the Court to depart from the ordinary rule as to the construction of the word "survivor." It is not a case in which we can correct the decree on the ground that there was an obvious mistake, it is a case in which the construction of the will must be argued over again, and in that respect I think this case is entirely distinguishable from the cases cited.

Then there is also another observation to be made. The present Appellant is one of several children of the testator. The decision was that when one child died without children the children of the testator who survived the testator should take the legacy in question. The Appellant is now the sole survivor. He for forty-six years took his chance of dying in the lifetime of the tenant for life, in which case the decree would have enured to the benefit of his estate, and now when it has turned out that he is the only child who has survived the tenant for life, though he has stood by and done nothing to question the decree for forty-six years, he comes here to ask for indulgence. I should say that is a special circumstance against him and in favour of his opponents.

Now as to the authorities cited. The case of *Brandon* v. *Brandon* (1) was a very singular one. The case was heard in 1825, and anybody looking at the Master's report and knowing our law could have seen that there was a blunder in it. The report stated that there was a widow and found who were the next of kin, and through some slip in drafting it omitted the widow from

(1) 7 D. M. & G. 365.

the persons entitled to the personalty. The decree followed this error and declared that the personal estate belonged to the next of kin as found by the Master, leaving out the widow. This manifest blunder escaped notice until 1846. Some steps were taken in that year, when the Master made a report finding that the testator's widow was entitled to a share, it having apparently escaped notice that the decree in 1825 had confirmed the Master's previous report which excluded the widow. An exception was taken to the report of 1846 but nothing was done, and the matter slept till 1856, when the widow's representatives applied for leave to appeal from the decree of 1825. The real question had been raised in 1846, just after the expiration of the twenty years, and the case was beyond argument, being that of a manifest and obvious blunder. It does not appear to me that that case, even irrespective of the change I have mentioned in legislative opinion, could have governed the present.

The other case, *Walmsley* v. *Foxhall* (1), was under the five years' rule and the application was made within nine years from the date of the decree. It is material to observe that the time for appealing was then five years and the appellant was three and a half years over the time. The time for appealing now is one year, and the present Appellant is forty-five years after the time. I think that is a distinction between the two cases. Again, all that can be taken to have been decided in that case was that the irregularity in the decree was a sufficient special circumstance when it was called to the attention of the Court before anything else had happened. As I understand in that case no change had taken place since the making of the decree in 1854 until December, 1862, when a child died. The Plaintiffs in 1863 applied for leave to appeal, and urged that there ought to have been no declaration as to cross remainders, and that the decree was irregular in deciding a future right. And then it was said, and said truly enough, that in 1854 the Court had not before it the proper parties to argue the question, for that parties affected by it might afterwards come into existence. Whereas here, as I said before, every person who could by any possibility be interested was of age and was present at the argument. So that we have in *Walmsley* v.

(1) 1 D. J. & S. 451.

C. A. 1882 — CURTIS v. SHEFFIELD. — Jessel, M.R.

Foxhall (1) two circumstances which do not occur here, first of all a short lapse of time, and secondly the fact of a change in the parties. It appears to me that that case is not an authority governing the present, and certainly would not compel the Court to accede to the present application. I must say that I have heard the application with surprise, I do not like to use strong adjectives with regard to it, but I think an application as regards the discretion of the Court could not have involved a more outrageous exercise of that discretion than we should make if we acceded to it, and I think it must be refused with costs.

COTTON, L.J.:—

I think it would be wrong to accede to this application, and it is unnecessary for me to add anything to the reasons that have been given.

LINDLEY, L.J.:—

I am of the same opinion. In order to grant the leave we must find some reason which will bear examination, and I cannot find any reason at all.

Solicitors for Appellant: *Henderson & Buckle.*
Solicitors for Respondents: *Loxley & Morley; Aldridge.*

(1) 1 D. J. & S. 451.

H. C. J.

WALSH *v.* LONSDALE.

C. A.
1882
FRY, J.
March 20.
C. A.
March 29.

[1882 W. 1127.]

Executory Agreement for Lease—Right of Distress—Minimum Rent—Rent payable in advance.

The Defendant on the 29th of May, 1879, agreed to grant and the Plaintiff to accept a lease of a mill for seven years at the rent of 30*s.* a year for each loom run, the Plaintiff not to run less than 540 looms. The lease to contain such stipulations as were inserted in a certain lease of the 1st of May, which was a lease at a fixed rent made payable in advance, and contained a stipulation that there should at all times be payable in advance on demand one whole year's rent in addition to the proportion, if any, of the yearly rent due and unpaid for the period previous to such demand. The Plaintiff was let into possession and paid rent quarterly, not in advance, down to the 1st of January, 1882, inclusive, having run in 1881 560 looms. In March, 1882, the Defendant demanded payment of £1005 14*s.* (£840 as one whole year's rent for 560 looms at 30*s.*, and £165 14*s.* as the proportionate part of the rent from the 1st of January last), and put in a distress. The Plaintiff thereupon commenced his action for damages for illegal distress, for an injunction, and for specific performance, and moved for an injunction. *Fry*, J., granted the injunction on the terms of the Plaintiff paying the £1005 14*s.* into Court. The Plaintiff appealed.

Held, that since the *Judicature Acts* the rule no longer holds that a person occupying under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent, but that he is to be treated in every Court as holding on the terms of the agreement:—

Held, therefore, that the Plaintiff holding under the agreement was subject to the same right of distress as if a lease had been granted, and that if under the terms of the lease a year's rent would have been payable in advance on demand a distress for that was lawful.

Semble, that such lease ought to reserve a minimum rent of £810 (30*s.* a piece on 540 looms), and that the stipulation in the lease of the 1st of May as to payment in advance would be applicable to such minimum rent though not to the whole rent. And the Defendant being willing to submit to the injunction on having £810 paid into Court, order varied accordingly, the Court being inclined to the view that there was a right of distress for that amount though the time had not arrived for finally determining the question.

BY an agreement dated the 29th of May, 1879, between the Plaintiff and Defendant it was agreed that the Defendant and all necessary parties should grant and the Plaintiff accept a lease of a weaving-shed known as *Providence Mill* with the engine-house and other buildings belonging thereto (except cottages) and

C. A. 1882 WALSH v. LONSDALE.

the steam-engine and other machinery thereon for a term of seven years from the time when the shed should be put in working order by the Defendant; the lessor at his own expense to find sufficient steam power for driving the looms and other machinery. "The rent to be £2 10*s.* per loom per annum for so many looms as the lessee shall run. The lessee shall not run less than 300 looms during the said first year, and he shall in every year afterwards run not less than 540 looms. The lessee to have the power whenever he shall think fit to find steam and steam power for running the said weaving shed machinery, looms, and premises, in which case the rent shall be reduced to £1 10*s.* per loom per annum. Until the lessee shall find steam and steam power the engine-house, boiler-house, mechanics' shop, stable, and yard adjoining thereto shall be excluded from the demise." There was a provision for the lessee to pay the premiums for insurance against fire and the following clause: "The lease to be prepared by the solicitor to the lessor and approved by the solicitor to the lessee, and to contain such covenants, provisoes, powers, and conditions as are usually inserted in leases of a similar nature, and particularly those inserted in a lease of the *Newfield Mills, Darwen*, dated the 1st of May instant, made between *T. A. Aspden* of the one part, and *Robert Bradley* of the other part, or such of them as can be made applicable to the tenancy hereby agreed to be created."

The lease of the *Newfield Mills* referred to in the above agreement was a lease for a term of four years from the 1st of May, 1879, "Yielding and paying therefor yearly in advance on the day of the date of these presents, and on the 1st day of May in every year during the continuance of the said term, unto the said *T. A. Aspden*, his executors, administrators, and assigns, the clear yearly rent of £876: Provided nevertheless, and it is hereby expressly agreed and declared, that there shall at all times during the continuance of this demise (except in the last year of the said term) be due and payable in advance on demand one whole year's rent of the premises hereby demised in addition to the proportion (if any) of the said yearly rent due and unpaid for the period previous to such demand."

The Plaintiff was let into possession on the 1st of July, 1879,

and subsequently gave notice to the Defendant that he would provide his own steam and steam power from the 1st of July, 1880, which he accordingly did. The Plaintiff paid rent to a mortgagee of the Defendant quarterly, and not in advance, down to the 1st of January, 1882. In the year 1881 the Plaintiff worked 560 looms.

On the 13th of March, 1882, the Defendant served the Plaintiff with the following notice:—

"I hereby demand immediate payment of £1013 14*s*., being as to £840 part thereof one whole year's rent in advance from this day of the mill and premises you now occupy as my tenant, and as to £165 14*s*. part thereof, the balance of the rent of such mill and premises from the 1st day of January last up to this day, and as to £8, the remainder thereof, for insurance paid by me to the *Imperial Fire Insurance Company* for insuring the said mill and premises."

On the 15th of March the Defendant put in a distress for rent.

The Plaintiff thereupon commenced this action claiming damages for improperly distraining, an injunction to restrain the Defendant from selling under the distress and from continuing in possession, and specific performance of the agreement for a lease. The Plaintiff moved for an injunction. The motion was heard before Mr. Justice *Fry* on the 20th of March, 1882.

Cozens-Hardy, Q.C., and *Farwell*, for the Plaintiff:—

The Plaintiff paid his rent quarterly to the Defendant's mortgagee till October, 1880; he never paid rent in advance to him. The payment to the mortgagee created a new tenancy, and he only consented to the Plaintiff's paying the rent to the mortgagor in the same way. If the Plaintiff pays a whole year's rent to the mortgagor he will still be liable to the mortgagee. But the distress cannot in any view be proper. There is nothing but an agreement, no lease has been executed. The agreement is only evidence of the terms of a legal tenancy from year to year. To justify a distress there must be a legal tenancy and a fixed rent. Here the rent is not fixed, it is at the rate of so much per loom

C. A. 1882 WALSH v. LONSDALE.

run by the tenant. The provisions of the other lease which is referred to are not in this respect applicable to an uncertain rent of this nature. At any rate they cannot apply until the end of the year, when it will be known how many looms have been run. And, on any construction, a whole year's rent in advance cannot be demanded at any broken period of the year. There is no rent in arrear, and the payments of rent already made afford evidence of a tenancy under which rent is payable quarterly.

Glasse, Q.C., and *Levett*, for the Defendant:—

If the rent can be rendered certain it will support a distress. All the authorities shew that this is so. The lease was granted after the date of the mortgage. The Plaintiff was let in as tenant to the mortgagor. Payment of the rent to the mortgagee was not an attornment to him: *Trent* v. *Hunt* (1); *Woodfall's* Landlord and Tenant (2). When a distress has been once issued the Court will not restrain further proceedings under it except on the terms of payment of the rent into Court. In *Shaw* v. *Earl of Jersey* (3) the distress had not been levied. Even where an excessive distress has been levied the Court will not turn the landlord out of possession, but will impose terms on him. An action can be brought for an excessive distress. If there is a tenancy there is a right to distrain. In the present case there is a sufficient constitution of a tenancy; payment of rent for a year is enough to do that. The year's rent which we claim is the minimum rent, independent of the number of looms run. That is sufficiently certain to support a distress. Under s. 25 (sub-sect. 5) of the *Judicature Act*, 1873, a mortgagor in possession is entitled to sue for rent in his own name.

Cozens-Hardy, in reply.

FRY, J.:—

The first question in controversy between the parties is this. The lease of the 1st of May, 1879, referred to in the agreement, contained a stipulation to the effect that the rent should be pay-

(1) 9 Ex. 14. 17 Jan 1899 (2) 11th Ed. p. 387.
(3) 4 C. P. D. 120.

able in advance, and this further stipulation, that on any given day the lessor might require the lessee to pay a year's rent and also the arrears of rent which were then due. So that the rent was made payable a year in advance *de anno in annum*, and also made payable on demand *de die in diem*. The question is whether that clause is to be introduced with regard to the rent payable under the agreement of the 29th of May, 1879. The Plaintiff says that it cannot be applied to this rent, which cannot be ascertained at the beginning of the year, the Defendant contends that it can be applied to the minimum rent. [His Lordship then adverted to another question, viz., whether the draft of a lease making a rent of £840 payable in advance had not been so approved by the Plaintiff as to make it binding on him.]

C. A. 1882 WALSH v. LONSDALE.

Both these questions are of a very serious description, and upon both of them the present inclination of my mind is in favour of the Defendant rather than the Plaintiff. In that state of circumstances I think that I ought either to refuse this motion or to grant it only on the terms of the Plaintiff paying the whole amount claimed into Court, and as the Defendant does not object to an injunction on those terms it will be granted accordingly.

An order was accordingly made directing that on payment by the Plaintiff into Court of £1005 14*s.* (the £8 for insurance having been paid) the Defendant should withdraw from possession under the distress.

W. L. C.

The Plaintiff appealed. The appeal was heard on the 29th of March, 1882. C. A.

Cozens-Hardy, Q.C., *Henn Collins*, and *Farwell*, for the Plaintiff:—

We are in possession under an agreement which does not operate as a present demise. Our position at law therefore is that of tenant from year to year. Now to justify a distress there must be a legal tenancy and rent in arrear. There can be no such thing as an equitable distress. Distress is a legal remedy, and here the payment of rent is evidence of a legal tenancy with a rent not payable by anticipation. The provision as to rent being

C. A. 1882 WALSH v. LONSDALE.

paid beforehand is not "applicable to the tenancy hereby created," since the rent is at so much per loom run, and it cannot be told till the end of the year what is the number of looms run.

[COTTON, L.J.:—Ought not the lease to reserve a minimum rent as there is a covenant to run not less than a certain number of looms? There would be no absurdity in making a minimum rent payable in advance.]

It is not so payable at law, and distress cannot arise from a mere contract.

[JESSEL, M.R.:—A tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed. He is not since the *Judicature Act* a tenant from year to year, he holds under the agreement, and every branch of the Court must now give him the same rights.]

Glasse, Q.C., and *Levett*, *contrà*, were asked whether they wished to contend that the Defendant was entitled to have more than £810 (30*s.* on 540 looms) brought into Court, and having replied that they should be content with that security, were not called upon.

JESSEL, M.R.:—

It is not necessary on the present occasion to decide finally what the rights of the parties are. If the Court sees that there is a fair question to be decided it will take security so that the party who ultimately succeeds may be in the right position. The question is one of some nicety. There is an agreement for a lease under which possession has been given. Now since the *Judicature Act* the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by

specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year. He has a right to say, "I have a lease in equity, and you can only re-enter if I have committed such a breach of covenant as would if a lease had been granted have entitled you to re-enter according to the terms of a proper proviso for re-entry." That being so, it appears to me that being a lessee in equity he cannot complain of the exercise of the right of distress merely because the actual parchment has not been signed and sealed.

The next question is, how ought the lease to be drawn? And that is a question of some nicety. I do not wish now finally to decide it, and on an application of this kind it is not necessary to do so, but I think the Court is bound to say what its present opinion is, because that is material on the question of what ought to be done until the trial. The whole difficulty arises from a single clause. Instead of taking the trouble to state in detail what covenants the lease was to contain they have adopted this short form:—[His Lordship read the clause which is given verbatim above.]

When we look at the lease of the *Newfield Mills* we find that it is a lease at a rent certain payable beforehand, and the question is how far that provision can be made applicable to the present very peculiar agreement. That agreement provides that the lessor at his own expense is to find steam power for driving and running the machinery, and that the rent is to be £2 10*s.* for every loom run, but for the first year the lessee is not to run less than 300, and afterwards not less than 540 looms. Then there is a proviso that the lessee is to have the right, whenever he shall think fit, to find the steam power for himself, and in that case his rent is to be 30*s.* per loom. There is a further proviso that until the lessee shall find the steam power the engine-house, boiler-house, mechanics' shop, stables, and yard adjoining thereto shall be excluded from the demise. As I read that it means that when the lessee once elects to provide his own steam power, the excepted particulars, are included in the demise, and then the lessor is no

C. A. 1882 WALSH v. LONSDALE. Jessel, M.R.

longer bound to find the steam power because he has demised the very thing that produces the steam power, and the lessee is now the lessee of the engine-house, and the rest, and has to find steam power for himself. The lessee has exercised the option to find his own steam power, and the result is that now he is only liable to pay 30*s.* per loom.

Now the lessee agrees to run not less than 540 looms, and the next question is, whether in drawing the lease a dead or minimum rent ought to be reserved for 540 looms, or is it to be left on covenant. My present opinion is that there ought to be a dead rent. There is no longer any obligation on the lessor to find the steam power; and it appears to me, therefore, that it would be a right thing to reserve in the lease a dead rent of £810, being at the rate of 30*s.* a loom for 540 looms. If that is so, the stipulation as to paying rent beforehand can apply to that £810 a year, and the covenants and provisions in the lease of the *Newfield Mills*, *Darwen*, could be made applicable to this minimum rent. Therefore it is my present opinion, though I do not give it as a final opinion, that the rent is payable beforehand to the extent of £810.

The result, therefore, will be to vary the order of the Court below by making the sum to be paid into Court £810 instead of £1005 14*s.* The Plaintiff will pay the costs of the appeal.

COTTON, L.J.:—

I am of the same opinion. The question as to whether the Defendant was right in putting in this distress must depend upon questions which have to be decided at the hearing of the cause, and the only question we have now to consider is what is right to be done between the parties for the purpose of keeping things *in statu quo*, and preserving their rights until the questions between them can be decided.

This landlord has put in a distress. He is right if the lease under which the tenant must be taken to be holding this land or premises would give him rent beforehand. This is not the time for finally deciding whether he is entitled to any and to what rent payable beforehand, but the question before us is whether we are now at once to deprive the landlord of any security which he has

in his hands for the payment of his rent? In my opinion we ought not. Of course, before allowing the landlord to retain the security given by the distress we must be satisfied that there is a *primâ facie* case in his favour, and in my opinion there is. It would be wrong for us absolutely to decide now how this lease should be framed, for there are many matters which would require consideration, one clause may depend on another, and the question how one clause is to be dealt with may affect the other provisions in the lease. But it is my present opinion that there ought to be reserved as dead-rent a rent which will correspond to the minimum number of looms which the Plaintiff is to run in any particular year, and after the first year it is to be always 540.

If, then, there is to be a dead-rent, the provision in the lease of the 1st of May that the rent thereby reserved shall be beforehand rent can be made applicable to the present tenancy by making it apply to the dead or fixed rent of £810 a year, leaving the payment of the remaining sum, if any, which is to be paid by the tenant to be enforced by the landlord under the covenants when it is ascertained how many looms the tenant has run.

In my opinion, therefore, there is at least such a *primâ facie* case in favour of the Defendant that we ought not to deprive him of the security which the distress gives him without the Plaintiff paying into Court that which will be a sufficient security for the Defendant if he is right in his contention, reducing the amount to £810 as the Master of the Rolls has already said.

LINDLEY, L.J.:—

I also think that the rights of the parties in this case turn upon the lease as it ought to be framed in pursuance of the contract into which these parties have entered. I do not agree with the contention of Mr. *Cozens-Hardy* and Mr. *Collins* that, according to the true construction of the agreement, the whole of the rent would depend simply upon covenant, and be an unascertained sum till the end of the year; in other words I think, as at present advised, that the lease should be so worded that there would be a minimum rent reserved. If so the provisions in the lease of the 1st of May which relate to the payment of rent in advance and the power of distress accordingly would be let in so far as regards

C. A. 1882 WALSH v. LONSDALE. Lindley, L.J.

the minimum rent. I think Mr. Justice *Fry* has inserted too large a sum in his order, because he has treated the whole rent as payable in advance. I do not think that correct; but to the extent of the minimum rent, which comes to £810, it appears to me we ought not to compel the landlord to withdraw unless on the terms of the tenant paying that money into Court, and of course the proper form of lease will be settled hereafter if the action goes on in the regular course.

Solicitors for Plaintiff: *Pritchard, Englefield, & Co.*
Solicitors for Defendant: *Bower & Cotton.*

H. C. J.

C. A. 1882 KAY, J. *Feb.* 8, 9. C. A. *April* 3, 5.

TUCKER *v.* LINGER.

[1876 T. 41.]

Agricultural Tenant — Waste — Selling Flints — Reservation of Mines and Minerals—Custom of Country—Repairs—Finding Materials—Damage.

By an agreement for a lease the tenant agreed to cultivate the land according to the most approved system of husbandry and to use it for agricultural purposes only, and to commit no waste. The lessor reserved "all mines and minerals, sand, quarries of stone, brickearth, and gravel pits." The farm was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and it was necessary to remove them in order to cultivate the land effectually. The tenant removed the flints which came to the surface in the ordinary course of agricultural operations and sold them, and there was evidence that it was the custom of the country for tenants to do so, when not prohibited by their leases:—

Held, by *Kay*, J., and by the Court of Appeal, that such a custom was reasonable and good.

In ascertaining the nature of an agricultural custom regard is to be had not so much to what the witnesses state to be their opinion as to the extent of the custom, as to what they prove to have been publicly done throughout the district.

Held, further, that the reservation of minerals in the agreement did not indicate an intention to exclude the custom so as to deprive the tenant of this right.

The tenant agreed to keep the buildings in good repair. The landlord, by a subsequent clause, agreed, on notice from the tenant, to find materials for repairs, the tenant doing the drawing and labour. A barn requiring repair the tenant gave the landlord notice to find materials, which he failed to do for more than the allowed period. The barn remained out of repair, in con-

sequence of which a storm damaged the roof, and the rain entered and damaged the tenant's corn :—

Held, by *Kay*, J., that the tenant was not entitled to damages for the injury done to his corn, for that his obligation to repair was not conditional on the landlord finding materials, and that the damage arose from his own failure to carry out his part of the contract, and that he ought to have repaired, and claimed the cost of the materials from the landlord.

Affirmed by H. of L. 24 June 1884.

AN agreement made in October, 1875, for a lease of a farm called *Portnalls*, in *Surrey*, containing 300 acres more or less, by the Plaintiff to the Defendant, contained (*inter alia*) the following stipulations :—

"The term to be seven, fourteen, or twenty-one years from Michaelmas, 1875, determinable by either party at the end of the seventh or fourteenth year by giving twelve months' previous notice in writing. Rent £1 per acre per annum, payable quarterly." "The lessee to keep and leave in good and tenantable repair all the buildings and erections, gates, stiles, fences, and ditches, and to paint and tar where before painted and tarred all the external wood and ironwork in every fourth year, and internally every seventh year. The lessee to cultivate and manage the land on the most approved system of husbandry, so as always to keep the same in good heart and condition and to commit no waste." . . . . "The lessee not to underlet, assign, or otherwise part with the lease without the consent in writing of the lessor, nor use the land for other than agricultural purposes. The lessor reserves all timber trees and tellers and all bodies of pollards and all mines and minerals, sand, quarries of stone, brickearth, and gravel pits, with liberty to enter to fell, cut down, dig, take, convert, and carry away the same, doing no unnecessary damage." . . . . "The lessor to find timber, bricks, and tiles for repairs within five miles of the premises, the lessee to do the drawing and labour. He, the lessee, to give to the lessor three months' notice in writing of his requirements. The lease to contain all other usual and customary covenants embodied in leases of land in this neighbourhood, so far as they are consistent with the foregoing special conditions, and to be prepared by the lessor's solicitor."

In the following year the Plaintiff commenced this action against the Defendant, alleging that, shortly after the Defendant

C. A. 1882 TUCKER v. LINGER.

took possession of the farm, he, without the knowledge or consent of the Plaintiff, commenced collecting flint and other stones from the farm, and placing them in large heaps for the purpose of selling them; and that the Defendant had sold large quantities of such stones, which were worth at least 3s. 6d. a load. The Plaintiff claimed an injunction to restrain the Defendant from selling or carrying off any flint or other stones from the farm and an account of the moneys received by the Defendant in respect of them. Subsequently the Defendant set up a claim for damages on the ground that he had applied to the landlord for materials to repair a barn on the demised premises, that the landlord had omitted to supply them, and that, owing to the want of repairs, the roof was injured by a storm, and some wheat which the lessee had in the barn was injured by the rain coming in.

On the 17th of February, 1880, an order was made in this and two subsequent actions between the same parties by which, *inter alia*, it was referred to Mr. *Roupell*, one of the official referees, to inquire and report "what, if anything, is due by the Defendant to the Plaintiff in the first-mentioned action for damages in respect of the matters therein complained of." The reference also extended to the damages claimed by the Defendant in respect of the omission to supply materials.

The official referee reported that the Defendant had admitted before him that ever since he had been tenant of *Portnalls Farm* he had picked from the farm surface flints (but no other stones) brought to the surface by ordinary ploughing, and had sold them. That the Defendant insisted that the agreement did not prevent him from picking and selling surface flints, and that by a well-known universal local custom of the flinty district in which *Portnalls Farm* lies, tenants were entitled by custom, unless restrained by special agreement, to pick and sell surface flints for their own benefit. The referee further reported that seven tenants of farms holding in the aggregate between 2000 and 3000 acres of land in the district were produced as witnesses before him, and testified that they had always (averaging fifteen years each) openly picked and sold for their own benefit surface flints from their farms. That one deposed to having sold flints to his own landlord, and all deposed to having openly sold them to the local surveyors of

the highway board. That six of the leases or agreements under which the above tenants held were produced before him, and in no one was there any mention of picking or selling surface flints, but in each was contained a reservation to the landlord of "all mines and minerals, quarries of stone, chalk, brickearth, and gravel pits, with authority to enter, dig, take, and carry away the same, doing no unnecessary damage." That the seventh of the above tenants held only under a verbal agreement.

After noticing further the evidence of several witnesses, the referee proceeded as follows:—

"I give no weight to opinions and belief of witnesses on either side, and I rely upon facts establishing an open and universal practice for years past of tenants in the flinty district, not restrained by contract, picking and selling flints off their farms for their own benefit, such practice being almost without exception allowed and unchallenged by their lessors."

"As regards the alleged custom for tenants in the flinty district unrestrained by agreement to pick and sell flints for their own benefit, it was admitted by all the witnesses before me that every ploughing brings to the surface as many fresh flints as the preceding one did, and that the supply of flints is interminable and inexhaustible.

"It was also admitted that the presence of many flints on the surface (large flints are the only ones that remunerate the picker, and are in fact the only ones picked) is injurious to and interferes with vegetation and husbandry, and renders the use of modern agricultural machines for mowing and reaping impossible. Mr. *Tucker's* land agent admitted that he did not think that the picking of large quantities of surface flints from *Portnalls Farm* was prejudicial to it, and also that the said farm had not been injured during Mr. *Linger's* tenancy of it by excessive flint picking.

"Mr. *Lees*, a surveyor and valuer at *Reigate*, deposed to his thoroughly knowing *Portnalls Farm*, and that it was impracticable to remove too many surface flints from it as each ploughing brought up to the surface as many flints as the last one had brought up.

"Mr. *Millard*, a land agent, called by Mr. *Tucker*, deposed to Mr. *Linger's* crops on *Portnalls Farm* being of an average good-

C. A. 1882 TUCKER v. LINGER.

ness. No allegation was made that Mr. *Linger* had not cultivated and managed his farm on the most approved system of husbandry, or that he had not kept the farm as required by his agreement 'in good heart and condition.'" . . .

"On the whole evidence as regards waste having been committed by Mr. *Linger* through picking and selling surface flints from *Portnalls Farm*, I report it to be a fact that for many years past tenants of farms in the flinty district where *Portnalls Farm* lies have, unless restrained by agreement, been accustomed to pick and sell surface flints for their own benefit; that the picking of surface flints from their farms is necessary for remunerative husbandry and for the employment of modern agricultural implements; that the quantity picked, though without stint, cannot be injurious to the landlord or reversioner, as the supply of flints is interminable and inexhaustible; and that it is a reasonable and good district custom. I therefore report that I assess no damages against Mr. *Linger* for picking surface flints from his said farm and selling them for his own benefit."

As regards the injury to the wheat the referee assessed the damages to be paid by the lessor at £60.

None of the witnesses alleged that there was any custom allowing a tenant to dig for flints, and most of them expressly negatived the existence of any such custom, saying that the custom only extended to flints brought to the surface by ploughing. Several of them, however, stated their opinion to be that a tenant was at liberty to plough for the purpose of bringing flints to the surface to be picked. They differed as to whether it would be worth a tenant's while to do so, most of them saying that it would not.

The case came before Mr. Justice *Kay* on adjourned summons to vary the report. The summons came on for hearing on the 8th of February, 1882.

Davey, Q.C., and *C. H. Anderson*, for the landlord:—

If there is a custom to dig flints it is in this case excluded by express contract, as the minerals are reserved to the landlord: *Hext* v. *Gill* (1). The flints are part of the freehold, and cannot be taken away by an agricultural tenant.

(1) Law Rep. 7 Ch. 699.

Fullarton, and *Muir*, for the tenant:—

The Court must have regard to the context, which shews that the word "minerals" cannot here include flints. Everything which is not to be taken is mentioned: *Darvill* v. *Roper* (1); *Bell* v. *Wilson* (2). A tenant may not open a gravel pit, but may dig and sell from an open pit unless there is an express reservation. Tenant for life could do so, and there is no difference between tenant for life and tenant for years. If the tenant dug flints purposely it might be different, but they came to the surface in the regular course of ploughing. No injury is done to the land by picking them off, in fact it is improved. It would not be waste merely to pick off the flints, and selling them cannot turn a previous innocent act into waste. The reason why cutting a tree is waste is that thereby the freehold is damaged. Collecting the flints is good husbandry, and the tenant is allowed to sell them as compensation for his trouble. The practice has been proved, and a farming custom need not be immemorial, but need only be so far established as to be read into the lease. In *Hext* v. *Gill* (3) the *obiter dicta* perhaps go too far: *Attorney-General for the Isle of Man* v. *Mylchreest* (4). There is nothing unreasonable in the custom: *Marquis of Salisbury* v. *Gladstone* (5).

Davey, in reply:—

A farming custom to be good must be one which might reasonably be presumed to be contracted for: *Hutton* v. *Warren* (6); but is it reasonable that a tenant is to be allowed to sell part of the soil, rendering it impossible for him to restore the *corpus* at the end of the term? An open gravel pit is merely part of the ordinary working of the farm: *Co. Litt.* (7). Besides, the word "minerals" here clearly includes flint stones and excludes the custom: *Midland Railway Company* v. *Checkley* (8). The use of other words does not limit the meaning of the word "minerals"; such expressions are common in agricultural leases, as for instance the reservation of timber and timberlike trees.

(1) 3 Drew. 294.
(2) 2 Dr. & Sm. 395; Law Rep. 1 Ch. 303.
(3) Law Rep. 7 Ch. 699.
(4) 4 App. Cas. 294.
(5) 9 H. L. C. 692.
(6) 1 M. & W. 466.
(7) 54 b.
(8) Law Rep. 4 Eq. 19.

C. A. 1882 TUCKER v. LINGER.

KAY, J., after stating the facts:—

The question is whether in picking and selling these flints the tenant has done a wrong to his landlord. A good deal of evidence was given to shew that between landlord and tenant in those parts there was a universal custom for tenants to plough up flint stones and to collect them when so ploughed up and to sell them for their own benefit. Now the first question is whether that custom as between landlord and tenant is a reasonable and good custom or not. Observe it is not like a custom to dig new gravel pits or to carry on operations for the purpose of getting the flints and selling them; but the flints in the ordinary agricultural operation of ploughing are turned up, and it is said that in good husbandry it is proper to collect them off the land, both because they interfere with the fertility of the land, and because they would be injurious to reaping machines and the like if left on the land. I have no doubt that certain customs as between landlord and tenant have been from time to time approved of which do amount to a dealing with that which but for custom would be part of the inheritance and pass to the landlord. For example, take the case which has been referred to, a custom for a tenant to enter after a lease has expired and take what is called the way-going crop—the crop which he has sown—though that crop at the time when he enters for the taking it is part of the inheritance, because it has not been severed. That may be a perfectly good custom, and although I am not in the least inclined to give to agricultural tenants any greater interest in the inheritance or any larger right of using it than that which is to be implied from all the facts, of which one of the most material is that they are agricultural tenants only, I am not at all prepared to say that what is claimed in this case is not a good custom.

Then the next question is, whether, if this be a good custom, it is excluded by this agreement; because, whether it is a good custom or not, it is quite plain that the lessor and lessee may contract themselves out of it. There is a contract not to commit waste, and there is a contract by which the lessor reserves, amongst other things, "all mines and minerals, sand, quarries of stone, brickearth, and gravel pits." A number of cases have been referred to on that subject which I need not go

through at length. There is no doubt that the word "minerals" is a word of very large import unless the meaning be restrained. For that I need only refer to *Hext* v. *Gill* (1), following *Midland Railway Company* v. *Checkley* (2), where Lord *Romilly* gave to the word "minerals" its widest possible meaning. But then there is a case which seems to me very important indeed on this question, *Attorney-General for the Isle of Man* v. *Mylchreest* (3). There the words were in an Act of Parliament which confirmed to customary tenants their ancient customary estates of inheritance, "Saving always unto *James* Earl of *Derby* and all other persons who shall hereafter become Lords of the Isle all such royalties, regalia . . . mines and minerals of what kind and nature soever" (very large words), "quarries and delfs of flagg slate or stone, franchises, liberties, privileges, and jurisdictions whatsoever as now are or at any time heretofore have been invested in *James* Earl of *Derby* or in any of his ancestors Lords of the Isle." The judgment was delivered by Sir *Montague Smith*, whose learning and accuracy of language make everything I am going to read of great importance. He refers to *Hext* v. *Gill*, and to Lord Justice *Mellish's* statement that "a reservation of minerals includes every substance that can be got from underneath the surface of the earth for the purpose of profit unless there is something in the context or nature of the transaction to induce the Court to give it a more limited meaning." Then he goes on to say, "In that case there was nothing in the context or nature of the transaction to explain or qualify the word, nor any usage to shew in what way the parties had interpreted it. On the contrary, the nature of the transaction in the view of the Lord Justice supported the widest construction of the word. He went on to observe that the lord of the manor is beyond all question entitled to the minerals in the most general sense of the word under a copyhold tenement, and that there is nothing the copyhold tenant is entitled to get out of the soil and sell for a profit, adding, however, the important qualification 'in the absence of special custom.' It was not pretended in that case that any custom existed, and consequently the exception of minerals in its widest sense was consistent

(1) Law Rep. 7 Ch. 699. (2) Law Rep. 4 Eq. 19.
(3) 4 App. Cas. 294, 305, 307.

C. A. 1882 TUCKER v. LINGER. Kay, J.

with the pre-existing position and rights of the parties. In the present case a custom for the tenants to take clay and sand has been shewn to exist. It was not therefore *à priori* to be expected that anything would be found in an Act passed for declaring and confirming the existing rights of the tenants which should destroy one of those rights." No doubt the learned Judge comes to that construction with a preconception that there was not likely to be anything in the Act which would reserve clay and sand, and he goes on thus:—"The words 'quarries and delfs of flagg slate or stone,' appear to be used to describe open workings and the specified substances got by such workings as distinguished from mines properly so called and mineral substances usually got by underground works. The word 'delfs' probably means open pits or diggings. If the word 'minerals' were intended to be used in the widest signification it was obviously unnecessary to make specific mention of 'flagg slate and stone.' The intention appears to have been to except two classes of things, first, mines and all substances of whatever kind and nature got by mining, and, secondly, quarries and delfs, not of all substances which might be got by quarrying or open pits, but of those only which are specifically described. It is not disputed that clay and sand are got from open workings." He decides that the words did not include clay and sand. Now I quite agree that that construction was arrived at, commencing with a preconception, as I have said, that it was not likely that anything would be found in the Act which would reserve clay and sand; but the construction is the construction of the words used, and I for my part cannot see that these words at all materially differ. Here we have "all mines and minerals," without the words "of what nature or kind soever." Then come "sand, quarries of stone, brickearth, and gravel pits." So that, adopting the reasoning of Sir *Montague Smith*, I am entitled to say that the intention appears to have been to except two classes of things: first, mines and substances of whatever class and nature got by mining; and, secondly, quarries, brickearth, and gravel pits, not all substances which might be got by quarrying or open pits, but those only which are specifically described. If I had to rely upon the words only, using that reasoning, I could not take this to be an exception of such stones as might be

turned up in the agricultural operation of ploughing, although in one sense, no doubt, those stones are minerals. But besides that I think I am entitled to come to the consideration of these matters precisely with that kind of preconception which influenced Sir *Montague Smith* in that case, because here there is abundant evidence of a custom for the tenant under an agricultural lease to get and sell for his own benefit the stones he turns up by the plough. Therefore I am entitled to regard that custom or usage in construing the terms of the instrument, and accordingly for both reasons I come to the conclusion that this reservation did not include such flint stones as in the ordinary course of agricultural operations would be turned up by the tenant.

The next question is whether the tenant in taking these stones has committed waste, because by express words in this contract he is forbidden to commit waste. According to Lord *Coke* (1): "A man hath land in which there is a mine of coales or of the like, and maketh a lease of the land (without mentioning any mines) for lives or for yeares, the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof." Of course he might with a gravel pit or anything of that kind, but in this case there is no mine open, no gravel pit or quarry, but in the ordinary course of his agricultural operations he turns up what would otherwise be minerals, though they are not minerals within this exception, and those flint stones so turned up he is bound to get off the land for his own advantage. He gets them and collects them in heaps. Then he sells them. It seems to me impossible to say that either the severance from the soil, or the collecting of them in heaps, was waste in any sense. It was part of the agricultural operations, without which the culture of the land could not have been carried on with the same benefit.

But then there is a curious doctrine which is shortly stated in another passage of *Coke*. He says (2), speaking of a tenant for years: "The tenant cutteth down trees for reparations and selleth them, and after buyeth them againe and imploys them about necessary reparations, yet it is wast by the vendition." What that may mean I am not quite clear. Whether it means that the

(1) Co. Litt. p. 54 b. (2) Co. Litt. p. 53 b.

C. A. 1882 TUCKER v. LINGER. Kay, J.

act of selling relates back so as to make the whole thing waste from the beginning, or merely that the act of vendition was waste I do not know. However, it is of course a very great authority for saying that that which would not be waste without the sale, if the sale be improper thereby becomes waste. That raises a point of considerable nicety; but I do not know whether it is worth while pursuing it much further, because if there be a custom to do this, and the custom be a good custom, that altogether gets rid of the objection as to waste.

There is another objection which to my mind is very strong. Undoubtedly I must take it that the whole of this operation of removing the stones is an advantage to the land for agricultural purposes. There is no doubt that it is an advantage when the stones have been ploughed up to remove them from the surface. To collect them into heaps would be an advantage. To leave those heaps upon the land would not be an advantage in any way, but to take the heaps away and dispose of them seems to me to be an advantage to the land. At any rate the *onus* would be upon anybody who was objecting on the ground of waste to shew that it was a disadvantage. As to that there is a very old authority, *Barret* v. *Barret* (1): "The law will not allow anything to be waste which is not in any ways prejudicial to the inheritance." That was followed in *Doe* v. *Earl of Burlington* (2), where after considering the doctrine of waste the Lord Chief Justice *Denman* said: "Upon the whole there is no authority for saying that any act can be waste which is not injurious to the inheritance either first by diminishing the value of the estate, or secondly by increasing the burden upon it, or thirdly by impairing the evidence of title." I am happy to take the advantage of referring to a case argued against by Mr. *Davey*, *Doherty* v. *Allman* (3), where considerable alteration had been made in messuages upon land which had been let for years, and Lord *Cairns* in giving judgment says: "I doubt farther whether it must not be taken as clear from the evidence here that any jury or any tribunal judging upon the question of fact would not say that if there be technically what in the eye of the Common Law is called waste, still it is that

(1) Hetley, 35.

(2) 5 B. & Ad. 507, 517.

(3) 3 App. Cas. 709, 723.

ameliorating waste which has been spoken of in several of the cases cited at the Bar. That which is done if it be technically waste—and here I will assume in favour of the Appellant that it is technically, according to the Common Law, waste—yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance improves the inheritance." The same thing, if it were necessary to refer further to authority, came before the Master of the Rolls in *Jones* v. *Chappell* (1) where the doctrine as to that which is technically waste, but which in fact does no injury to the inheritance, is recognised. Therefore, supposing this to be a technical waste, if the Court is satisfied it is waste which does not injure the inheritance, it is no answer for the landlord to say that it benefits the tenant and puts money into his pocket.

But there remains yet a further point, and it is curious that a small matter of this kind should raise so many. Supposing it to be an improper act on the part of the tenant to sell the stones, for I cannot possibly allow that any other act done by him was in any sense in law improper, then to what damages would the landlord be entitled? According to those cases which I think are all collected in the case of *Llynvi Company* v. *Brogden* (2), that where a man has been mining improperly and taking minerals, like coal, which do not belong to him, if he has been a trespasser, then he is made to account for the value of the minerals taken, without any deduction for the cost of getting; but if he has not been a trespasser, and if the act of severance has been a rightful act, or presumably a rightful act, then all that the person who comes to get damages from him can get, supposing he proves that he is entitled to any damages, is the value of the thing *in situ*, and what would be the value *in situ* of these flints? Not a farthing. That again would be to my mind a complete answer to the claim. Though I am not in the least inclined to extend the rights of an agricultural tenant for years in the inheritance of the land, I cannot find in this case that any damage has been done to the landlord in any view of the matter, and accordingly I refuse this part of the application with costs.

The question as to the liability of the landlord for not repairing the barn, was then argued.

(1) Law Rep. 20 Eq. 539. (2) Law Rep. 11 Eq. 188.

C. A.

1882

TUCKER v. LINGER.

Davey, Q.C., and *C. H. Anderson*, for the landlord.

Fullarton, and *Muir*, for the tenant, cited *Fletcher* v. *Tayleur* (1); *Mayne* on Damages (2); *McMahon* v. *Field* (3).

KAY, J :—

I decide against the tenant on this point. Here were two obligations, one for the tenant to keep in repair, but that is not in the least conditional upon the landlord finding materials, which the landlord contracted that he would do. They were not in words or in substance dependent contracts, and therefore the damage which resulted from the actual non-repair of the barn (which was the thing in question) to the wheat stored in it was not proximately caused by the landlord failing to supply the tenant with materials for those repairs. The tenant sent notices to which the landlord paid no attention. Then what was the tenant's duty to himself and to his landlord? It was to do the repairs, because he had entered into an independent contract to do them, and he would then have had a claim against the landlord for all such materials as the landlord should have supplied. His not doing these repairs was a wrong of his own, and therefore any damage which resulted to him from the non-doing of the repairs was proximately caused by his own failure to carry out his own part of the contract and not by the failure of the landlord to supply the materials. Therefore the case does not seem to me to come within the authorities.

C. M.

C. A.

The landlord appealed as to the flints. The appeal came on for hearing on the 3rd of April, 1882.

Davey, Q.C., and *C. H. Anderson*, for the Appellant :—

The Defendant relies on an alleged custom to pick and sell flints. We say that the evidence does not prove the existence of any such custom and that such a custom is bad in law. A custom as between landlord and tenant means nothing more than this, that a practice is so prevalent in a particular district that the

(1) 17 C. B. 21. (2) Page 11.

(3) 7 Q. B. D. 591.

parties are supposed to have contracted on the footing of it unless the words they have used exclude it. Now the custom here alleged is to sell part of the inheritance. A custom to pick up flints, which for the purpose of agriculture are better out of the way, and use them on the tenement would certainly be reasonable. A custom to pick them and sell them might possibly be upheld, but here the Defendant sets up a custom to plough for flints, and his evidence cannot support a less custom.

But supposing the custom good and proved, its operation is excluded by the terms of the agreement, which reserves all minerals to the landlord. Mr. Justice *Kay* held that a tenant in the absence of special agreement to the contrary might do anything upon the demised property which did not amount to waste, for which *Co. Litt.* (1) was relied on, and that the expression "mines and minerals," was cut down by the subsequent words. The word "minerals" unless explained away by the context would certainly include flints, as is shewn by *Hext* v. *Gill* (2); *Bell* v. *Wilson* (3); *Midland Railway Company* v. *Checkley* (4). Mr. Justice *Kay* relied on *Attorney-General for the Isle of Man* v. *Mylchreest* (5), but in that case there was a reference to antecedent rights. The rights of the parties here must be governed by their agreement, and the reservation excludes the tenant from minerals. The use of the land is only to be for agricultural purposes, and this is making a profit out of the land by other means. The evidence shews that the tenant has ploughed for the purpose of getting flints, and in no view of the case can that be justified.

Fullarton, and *Muir*, for the Defendant:—

The Defendant has not used this land for any but agricultural purposes. He has agreed to cultivate it "according to the most approved system of husbandry." Now the evidence is clear that it is necessary for agricultural purposes to pick out the flints. The Defendant has not ploughed for them, he has only removed those which came to the surface in the ordinary course of farming operations; as regards severance and removal therefore he has

(1) 54 b.
(2) Law Rep. 7 Ch. 699.
(3) Law Rep. 1 Ch. 303.
(4) Ibid. 4 Eq. 19.
(5) 4 App. Cas. 294.

C. A. 1882 TUCKER v. LINGER.

done nothing but what he was entitled and even bound to do. The only question is whether he could sell them. Now to pick them is a process which causes some expense, and that they should go to the landlord when picked would not be reasonable—a custom for the tenant to sell them is therefore a reasonable custom and its existence is proved.

[JESSEL, M.R.:—When you sell part of the soil are you using the land for an agricultural purpose? Suppose part of the surface of the farm to be a bed of stiff clay on which nothing would grow, with a bed of fine loam underneath, could you sell off the clay on the ground that the thus making the land capable of cultivation was a fair agricultural purpose?]

That case is not similar—it is questionable whether the removing the clay would be an agricultural process. Here, we are obliged to sever the flints or the farm could not be cultivated at all. When severed they become chattels, and whether we can sell them or not cannot be affected by an agreement not to use the land for any but agricultural purposes, though such a stipulation might be held to prohibit ploughing on purpose to get them.

Then as to the reservation. Neither "mines" nor "minerals" has such an inflexible meaning that its effect cannot be modified by the context and surrounding circumstances: *Earl of Rosse* v. *Wainman* (1). Thus in *Attorney-General for the Isle of Man* v. *Mylchreest* (2) these words were held not to include clay or sand.

[JESSEL, M.R.:—Would tin got on the surface be within the reservation?]

Yes; it is a mineral, according to both the legal and the popular senses of the word. Clay, according to the popular sense of the word, is not. *Darvill* v. *Roper* (3) supports the limited construction.

[JESSEL, M.R.:—So far as that case conflicts with *Hext* v. *Gill* (4) it must be considered as overruled.]

Hext v. *Gill* does not lay down that the words may not be controlled by the context and the circumstances, but the contrary,

(1) 14 M. & W. 859.
(2) 4 App. Cas. 294.
(3) 3 Drew. 294.
(4) Law Rep. 7 Ch. 699.

and *Attorney-General for the Isle of Man* v. *Mylchreest* (1) shews that such general words do not exclude the custom of the country. Sand and brickearth are mentioned, and if it had been intended to reserve flints they would have been mentioned, it being the notorious custom of the neighbourhood for the tenant to take them. The scope of the reservation is shewn by this, that after the general words "mines and minerals" come several specific things which are within the legal but not within the popular sense of "mines and minerals," and none which are within the popular sense. This shews the intention to use the words "mines and minerals" in the popular sense and not in the wider legal sense. In *Hext* v. *Gill* (2) it is said that the result of the authorities is that a reservation of minerals includes every substance which can be got from underneath the earth for the purpose of profit, "unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." Here the context and the nature of the transaction shew that the limited meaning was intended. Suppose the land had been sold with a reservation of mines and minerals, could it be contended that the vendor could take these flints? The observations of Lord *Campbell* cited in *Eardley* v. *Granville* (3) are in our favour.

[JESSEL, M.R. :—That turns on an entirely different question, that of ownership of the space from which minerals are taken.]

Davey, in reply :—

[LINDLEY, L.J. :—Does not the fact that lessees whose leases contained a reservation of mines and minerals, picked and sold flints, shew that flints are not minerals according to the custom of the country?]

A custom cannot determine what are mines and minerals.

[JESSEL, M.R. :—*Hext* v. *Gill* (4) is against you on that.]

The witnesses prove too much, they assert a custom to plough for flints.

[JESSEL, M.R. :—They do not say they did it. What tenants generally do is public and binds the landlords. What they say

(1) 4 App. Cas. 294.
(2) Law Rep. 7 Ch. 712.
(3) 3 Ch. D. 826, 834.
(4) Law Rep. 7 Ch. 699.

C. A. 1882 TUCKER v. LINGER.

as to their opinion about the extent of the custom, goes for nothing.]

The reasonable view is that the custom only goes to allow tenants to use flints for the purposes of their farms; not to sell them.

JESSEL, M.R.:—

This is a case of very great singularity, and is by no means free from difficulty. I have often said, and I repeat, that if people will draw agreements in this loose style they cannot complain if Judges sometimes decide them to mean something they did not really intend. We can only deal with the words they have used.

In the present case we must first consider whether there is a custom proved in this district. An agricultural custom need not have subsisted from time immemorial, but it must have subsisted for a reasonable length of time, and it must be adequately proved. Again, as regards the proof. Those who have had to deal with evidence upon these subjects know that you very seldom get even two witnesses to give exactly the same account of an agricultural custom, unless it is of the simplest kind. The custom therefore must be collected not from what the witnesses say they think the custom is, but from what was publicly done throughout the district.

Trying the case in that way, I have come to the conclusion that there is proved a custom in this district for the tenant of an ordinary farm, where is no special stipulation as to flints, to take away the flints or pick off the flints which are turned up by reason of ploughing in the ordinary course of husbandry, and to sell those flints for his own benefit. It is said that such a custom is unreasonable, but I think not. It is proved most clearly, and is admitted by the Plaintiff's own agent and valuer, that if the flints were let alone the vegetation would be substantially stopped by them, so that the farm could not be cultivated at all. So far all the witnesses are agreed. There is a little difference as to the removal of small flints. All agree that the large flints must be removed, but it does not appear on the evidence to be essential to remove the small flints, though according to some of the witnesses it is desirable to do so.

It appears to me, therefore, not to be unreasonable that a tenant who is compelled to remove flints as being injurious to the land, or being desirable to be removed in the ordinary course of husbandry, should not be compelled to leave them in heaps on the farm, and if he cannot otherwise use them should not be prevented from selling them. I do not see any reason why the Court should interfere with the ordinary custom of a country as being unreasonable except on the very strongest grounds. Farmers understand farming business a great deal better than Judges, and I have always thought that before a lawyer can say that a custom is unreasonable (even when it is not so general, if not universal, as this is) there ought to be very strong grounds for such a conclusion, and I am not aware of any in this case. That being so, I think that the custom is proved, and is reasonable.

The custom, then, being established, we must put ourselves in the position of the landlord and tenant when entering into this agreement, and what we have to decide is, whether there is enough in this agreement to exclude the custom. I am not sure whether I should have altogether concurred with the learned Judge in the Court below as to the construction of the agreement independently of the custom; but it is not necessary for me to say whether I should or should not, because knowing the custom I have come to the conclusion that the words of the agreement are not sufficient to exclude it. The words are, that the lessee is not to use the land for other than agricultural purposes, and the lessor reserves all timber trees and tellers and all bodies of pollards "and all mines and minerals, sand, quarries of stone, brickearth, and gravel pits, with liberty to enter, to fell, cut down, dig, take, convert, and carry away the same, doing no unnecessary damage."

As regards the interpretation of the word "minerals," the first observation to be made is, that the framer of the agreement did not stop at "mines and minerals," but went on to talk of "sand, quarries of stone, brickearth, and gravel pits." No satisfactory reason can be given for the insertion of these latter words, except that the parties were not very clear about the meaning of the word "minerals." That word would include, as was settled by the case of *Hext* v. *Gill* (1), "every substance which can be got from

(1) Law Rep. 7 Ch. 712.

C. A. 1882 TUCKER v. LINGER. Jessel, M.R.

underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." And in the same case, which related to china clay or kaolin, Vice-Chancellor *Wickens* says (1), "Therefore kaolin is excepted from the grant under which the Plaintiff claims, unless there can be shewn some custom of the country, something in the grant itself, or something in the reason of the thing, sufficient to induce the Court to consider the terms as used in a restricted and secondary sense." As the learned Judge says there must be some custom of the country or something in the reason of the thing to induce the Court to restrict the meaning of "minerals."

That being so, we first of all find that there are no open mines on this farm. No one would say that if there had been no exception at all of mines and minerals the tenant could have opened a mine; the exception, therefore, is not wanted except for the purpose of the liberty given to the landlord to enter and work. The next observation to be made is, that whatever is included in the word "mines" is included in the word "minerals." The word "mines," when used to express the substance worked as distinguished from the working, is confined to substances to be got by mining according to the ordinary sense of that term, and not by open working on the surface; and the word "minerals" certainly includes all those substances, although it includes something more. So that we have two words used here, one of which is unnecessary. Then we have "sand." Sand is certainly a mineral when it is worked at a profit and got by digging beneath the surface. Then "quarries of stone" are inserted because they are open workings. Then comes "brickearth" which is a mineral, and then "gravel pits," which are open workings.

We see, then, that the person who framed this agreement specifically mentioned certain things which were included in the term "minerals" according to its legal acceptation, and this leads to the inference that he used the word "minerals" in some special sense. Considering, then, the peculiarity of the wording, considering the position of the parties and the nature of the custom, it seems to me that the word "minerals" was not intended to be

(1) Law Rep. 7 Ch. 705.

used in such a sense as to cover those flints to which the custom related, though it might include flints not got according to the custom.

There is another view of the case which would have been conclusive if it had been clearly established, and that is, that the word "minerals" in this part of the country does not include flints taken according to the custom. I think that inferentially this is shewn to be the case, but there is no direct evidence as to it. Seven witnesses were called, of whom six held under leases or written agreements, in each of which there was an exception of mines and minerals at least as large as that in the agreement before us, and they all said that notwithstanding that exception they picked and sold the flints according to the custom. The inference is that both they and their landlords thought that the word "minerals" did not include them, or considered and treated it as not including them. That would be a strong ground for saying that according to the custom it does not include them, the only difficulty being, as I said before, that the evidence is not directly to the point, but merely leads to that inference.

For these reasons, and especially for the former reason, I have come to the conclusion that, considering the nature of the transaction, and having regard to the nature of the farm and to the custom of the district, there is not in this agreement sufficient to exclude the tenant from his right of taking the flints which have been picked up after having been brought to the surface in the ordinary course of husbandry.

[His Lordship then entered into the question whether it was shewn that the Defendant had ploughed for the purpose of getting flints, and stated his conclusion to be that the landlord had not proved his case in this respect.]

COTTON, L.J.:—

If the case had rested with me I should have felt very great difficulty in finding that any such custom as is alleged was proved.

The custom as alleged by some of the witnesses is certainly to use the land for other than agricultural purposes, and it

C. A. 1882 TUCKER v. LINGER. Cotton, L.J.

would require some very strong evidence to satisfy me that when land is let to a tenant for a particular purpose and to make a profit by it in that way, he is recognised as being at liberty to use it in another and a different way for the purpose of making a profit.

But this custom, if there be a custom, must in my opinion be restricted to that which the witness say they have done, viz. when ploughing the land for ordinary agricultural purposes to pick up and sell the stones which the ploughing of the land for those purposes and for no other purposes had brought to the surface. But is that sufficiently established? We must have regard, I think, to the circumstances under which this practice is said to have first originated. It was shewn, as I understand, on the evidence, that the tenants had sold stones to the surveyors of highways, but they had a right to take stones without payment from lands within their parish, and then the tenants might very naturally instead of allowing the surveyors of highways to take away the stones which were on the land and which came to the surface in the course of their ordinary agricultural operations, take off the stones and receive some payment from the surveyors to whom they delivered them. If that right of the surveyors has ceased, it ceased only a short time ago, so that I am not satisfied that the evidence makes out such a custom as the Defendant here seeks to rely upon. If there is no such custom this agreement would in my opinion preclude the tenant from carrying away these flints and selling them, for there is a reservation of "all mines and minerals." In my opinion the word "minerals" is sufficient to include flints. It is true that other words follow which would also be included in the term "minerals;" but in my opinion, although those words may to some extent be superfluous, they may have been put in to prevent any doubt being raised as to some of the things intended to be reserved. I am confirmed in that construction of this clause by this, that the purpose for which the land was leased was the purpose of enabling the tenant to make a profit out of it by agricultural operations and by those things which are usually considered as the produce of agricultural operations, and though here stones come to the surface in the course of agricultural operations, yet in my opinion they are not a natural product of

the farm such as those from which it is contemplated that a tenant is to make his profit when he takes a farm for agricultural purposes. As, however, my colleagues hold that the custom is established, their opinion must prevail. Assuming the custom to be established, I agree that there is no evidence to justify us in holding that the tenant has taken flints in excess of what the custom authorized.

LINDLEY, L.J.:—

I am of opinion that the conclusion come to by the official referee and by Mr. Justice *Kay* on this part of the case is correct.

I understand the matter to stand thus. This farm is in a district so flinty that the farms cannot be properly cultivated without removing to a considerable extent the flints which come to the surface in the ordinary course of ploughing. I am also satisfied that it is the custom or practice all through this district, for the farmers not only to remove the flints turned up in the ordinary course of husbandry, but to sell them for their own profit, except in cases where they are prohibited from so doing; and I am satisfied by the evidence that it is the practice all through the district to do so, even where the tenants hold under agreements worded as this is, reserving the mines and minerals to the landlord. Having those facts established, we have to consider whether the true construction of the clause in this agreement which reserves to the lessor "all the mines and minerals, and quarries of stone, brickearth and gravel pits," is to prevent the tenant from picking off the flints which come to the surface of the land in the ordinary course of husbandry, and selling them for his own benefit, as he clearly would be entitled to do, but for this clause.

Now, looking at the circumstances under which this agreement has been entered into, I think that the word "minerals" is not clear enough to exclude this practice from this particular farm. It is very true that *primâ facie*, and taking this clause alone, these flints would be included in this reservation. I do not positively say that I dissent from the opinion of Mr. Justice *Kay*, but I should feel considerable difficulty in construing this clause

C. A. 1882 TUCKER v. LINGER. Lindley, L.J.

favourably to the tenant apart from that custom or practice; but having regard to the custom or practice, I have not the slightest difficulty in coming to the conclusion that in this district the flints which are got as these flints are got are not considered as minerals within a clause of this description.

As to the alleged excess in getting flints, I think that the referee is right. As I understand the facts, the lessee has ploughed frequently, and he has taken off by picking and raking such flints as he chose to get, and to a large amount, after each ploughing. He certainly has not dug or quarried for flints, or got them except by means of ploughing, and it is plain to my mind from the evidence that he has not so ploughed as to commit a breach of that part of his agreement which requires him to cultivate and manage the land on the most approved system of husbandry. If he had ploughed for the purpose of getting flints and not for the purpose of keeping his farm in proper order, I think he would have committed a breach of that clause, and my opinion would have been adverse to him; but so long as he does not plough to such an extent as to break his covenant, it appears to me that he is at liberty to plough as much as he likes, and to pick off as many flints as he can get.

Solicitors for Plaintiff: *Mercer & Mercer.*
Solicitors for Defendant: *Morrisons.*

H. C. J.

In re HALL DARE'S CONTRACT.

C. A.
1882
V.-C. H.
April 1.
C. A.
April 5.

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 70 —*Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18)—*Irregular Order—Protection of Purchaser under Order.*

An order for sale under the *Settled Estates Act*, 1877, contained a direction dispensing with the concurrence or consent of the persons entitled, whether beneficially or otherwise, to any estate or interest subsequent to a certain estate tail, without naming them. The purchaser objected to the title on the ground that the order on the face of it was irregular:—

Held, by *Hall*, V.C., that under the special circumstances of the case it was unnecessary for the parties whose concurrence was dispensed with to be named in the order:

Held, by the Court of Appeal, that under the 70th section of the *Conveyancing and Law of Property Act*, 1881, the purchaser would in any event have a good title—that section being applicable whether the objection to the order appears on the face of it or not, and that the purchaser must complete.

BY the will of *R. W. Hall Dare*, dated the 23rd of January, 1836, certain real estates were limited to the use of his son *Francis M. Hall Dare* for life, with remainder to his first and other sons successively in tail, with remainder to the use of testator's son, *Henry Hall Dare* for life, with remainder to his sons successively in tail, with remainder to the use of the testator's after-born sons successively in tail, with remainder to the use of the testator's eldest son *Robert Westley Hall Dare* for life, with remainder to his sons successively in tail, with divers remainders over.

The testator died in May, 1836, having no after-born son.

Francis M. Hall Dare never married. *H. Hall Dare* had one son, *Henry A. K. Hall Dare*. *Robert Westley Hall Dare* died in 1866. He had two sons, *Robert W. Hall Dare*, the grandson, and *Charles Hall Dare*. *Robert W. Hall Dare*, the grandson, had two sons, *Robert W. Hall Dare*, the great grandson, and *Arthur Mildmay Hall Dare*, and four daughters, named in the petition, of whom *Elizabeth Frances Hall Dare* was the eldest.

By indenture, dated the 28th of February, 1878, *Henry Hall Dare* and his son, with the consent of *Francis M. Hall Dare* as protector, resettled the estate subject to the limitations prior to the estate of *Henry Hall Dare*, to the use of *Henry Hall Dare* for

C. A. 1882 *In re* HALL DARE'S CONTRACT.

life, with remainder to *Henry A. K. Hall Dare* in tail, with remainder to *Arthur Mildmay Hall Dare* for life, with remainder to his sons successively in tail, with remainder to *Robert Westley Hall Dare*, the great grandson, for life, with remainder to his sons successively in tail, with remainder to such of the uses declared by an indenture of the 19th of October, 1863, as were to arise after the failure or determination of the estate tail thereby limited to *Arthur Mildmay Hall Dare*.

H. A. K. Hall Dare died in 1880, without issue, and without having barred his estate tail under the deed of 1878.

The indenture of the 19th of October, 1863, purported to limit the estates after the death of the survivor of *Robert W. Hall Dare*, the son, and *Robert W. Hall Dare*, the grandson, to the use of the sons of *Robert W. Hall Dare*, the grandson, successively in tail male, with remainder to *Charles Hall Dare* for life, with remainder to his sons successively in tail male, with remainder to the use of the third, fourth, and every other son who should be born of *Robert W. Hall Dare*, the son, successively for their lives, and after the death of each such son to the use of his first and other sons successively in tail male, with remainder to the use of the first and every other daughter of *Robert W. Hall Dare*, the grandson, successively in tail male, with divers remainders over. *Charles Hall Dare* died a bachelor and an infant in 1876.

A petition under the *Settled Estates Act*, 1877, was presented by *Francis M. Hall Dare* and *Henry Hall Dare* to carry into effect a contract which had been entered into by the former for the sale of part of the settled estate. The petition set out at length the documents and facts of which a short summary is given above, and submitted that the limitations of the indenture of the 19th of October, 1863, subsequent to the limitations to the third and other unborn sons of *Robert W. Hall Dare*, the son, for their lives, were void for remoteness, and that the effect of the limitation in the deed of the 28th of February, 1878, to the uses of the deed of 1863, was either (*a*) a repetition of such of the subsequent uses of that deed as had not expired, in which case the property stood limited after the estates tail of *Robert W. Hall Dare*, the great grandson, to the use of *Elizabeth Frances Hall Dare* in tail male, with remainders over; or (*b*) that it was void,

and that in that case the estate tail of *Henry A. K. Hall Dare* and the remainder expectant thereon were barred only to the extent to which uses were validly limited by the deed of February, 1878, and that in that case instead of the remainder in tail to *Elizabeth Frances Hall Dare* there would be a remainder to the use of the first and every other son hereafter to be born of *Henry Hall Dare* successively in tail, with remainder to *Robert Westley Hall Dare*, the great grandson, in tail male, with remainder to the use of *Arthur Mildmay Hall Dare* in tail male, with remainders over.

The petition asked that the sale might be authorized, and "that the concurrence or consent in or to this application of the persons entitled, whether beneficially or otherwise, under the will and indentures mentioned in this petition to any estate or interest subsequent to the estate in tail male vested in the said *Elizabeth Frances Hall Dare*, or as the case may be, the said *Arthur Mildmay Hall Dare*, may be dispensed with."

It was proposed to serve notice upon the guardians of *Robert W. Hall Dare*, the great grandson, *Arthur Mildmay Hall Dare*, and *Elizabeth Frances Hall Dare*, all of whom were infants. The petition contained no information as to who the persons were whose concurrence was to be dispensed with beyond the above statement.

On the hearing of the petition an order was made authorizing the sale and dispensing with the concurrence or consent of the persons entitled after the estate tail in the terms of the clause of the prayer set out above.

An abstract of title was delivered to the purchasers. The objection was taken that it did not appear that notice to the persons entitled subsequently to the estates tail had been dispensed with, nor who they were. The vendors replied that the only persons to whom notice was required to be given by sect. 26 were persons whose consent was required by sects. 24 and 25, and that as their consent had been dispensed with no notice to them was requisite, and that, at all events, the purchasers would be protected by the *Conveyancing and Law of Property Act*, 1881, sect. 70. The purchasers answered that notice was necessary

C. A. 1882 *In re* HALL DARE'S CONTRACT.

under sect. 26, unless it was dispensed with under sect. 27, which did not apply to this case. That the 24th of the orders of the 19th of July, 1878, required the names of the persons notice to whom had been dispensed with to be stated in the order, and that the 70th section would not protect the purchasers for the reasons stated in Mr. *Wolstenholme's* note to that section.

The vendors took out a summons for a declaration that a good title had been shewn. The summons was heard before Vice-Chancellor *Hall* on the 1st of April, 1882.

Kekewich, Q.C., and *F. L. Wright*, for the vendors.

Whitehorne, Q.C., and *Austin*, for the purchasers.

HALL, V.C.:—

I am of opinion that the purchasers have got a good title, and that there is, in this case, no necessity to have specified the names and addresses of the persons referred to by Mr. *Whitehorne*. The Court in dealing with this case—a tenancy in tail—and in looking at the limitations of the settlement, thinks fit to dispense with service of notice upon them, *i.e.*, upon any person after the tenant in tail. It dispenses with notice, and with their concurrence or consent. I merely determine that in framing the order under the Act of Parliament it is not, under the circumstances which are shewn to exist here, necessary to have the names and addresses of all these persons in remainder specified in the order, and I hold that, notwithstanding that the particular order referred to states that the names of persons are to be specified. It does not seem to me to be necessary under the circumstances of this case. At the same time it seems to me that the order should state that the Court dispenses with compliance with that particular order so far as it requires the names or any other particulars not appearing in this order. If the purchasers would rather have the order without such statement that is another matter.

T. F. M.

C. A. The purchasers appealed. The appeal was heard on the 5th of April, 1882.

Whitehorne, Q.C., and *Austin*, for the Appellants :—

An order has been made dispensing with the concurrence of persons entitled subsequently to certain estates tail without naming them or giving any information who they are. There is no power under the *Settled Estates Act*, 1877, to dispense with service on unascertained persons. Sect. 26 requires notice to be given to all persons whose concurrence or consent is dispensed with under sect. 25, and the power given by sect. 27 of dispensing with notice is very limited in its character and does not extend to this case. The 24th rule of the Orders of December, 1878, requires the order to state the names of the persons to whom notice has been given and the names of the persons notice to whom has been dispensed with. This order does not comply with the rule, and therefore is irregular. The *Conveyancing and Law of Property Act*, 1881, sect. 70, does not cure the defect. It is understood by the profession that the section only applies to defects which do not appear on the face of the order: *Wolstenholme's* Conveyancing and Law of Property Act, 1881 (1). The effect of sect. 70 cannot have been intended to be so wide as this, that if the Court sells my estate behind my back the purchaser shall get a good title as against me.

Kekewich, Q.C., and *F. L. Wright*, for the vendors, were not called upon.

JESSEL, M.R. :—

I think that the decision of the Vice-Chancellor in this case holding the purchaser bound to complete was correct. As at present advised I think that the original order for sale was wrong in form, for that according to the provisions of the *Settled Estates Act* it was necessary that the persons entitled in remainder should be named in the petition and the order. But assuming the order to be irregular we have to consider the 70th section of the *Conveyancing and Law of Property Act*, 1881, which enacts that "An order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or

(1) 2nd ed. p. 109.

C. A. 1882 *In re* HALL DARE'S CONTRACT. Jessel, M.R.

service, whether the purchaser has notice of any such want or not." Then the 2nd clause of that section says: "This section shall have effect with respect to any lease, sale, or other act under the authority of the Court and purporting to be in pursuance of the *Settled Estates Act*, 1877, notwithstanding the exception in section 40 of that Act," which section applies to the very case we have to consider, that is, the case of concurrence or consent not being obtained or service not having been made or dispensed with. The only reason suggested why the sale here should not be protected by that section is that the section is not to apply where it can be seen upon the face of the order that the order is wrong. But who is to see it? The purchaser cannot see it. It is true that a learned lawyer acquainted with all the provisions of the Act may find it out, but in no other sense does it appear on the face of the order. No person not familiar with the provisions of the *Settled Estates Act* would find anything on the face of this order to lead him to suspect that it was wrong. Now to ask us to hold that whenever there appears on the face of an order something which would lead a person of sufficient learning and acquainted with the practice to the conclusion that the order is irregular, the 70th section does not apply, would be asking us to repeal a very plain enactment which was made for the protection of purchasers. The purchaser sees an order for sale made by the Court which has jurisdiction in the matter, and he is not to trouble himself any further. If any mistake has been made still he is to get a good title, all claims of the persons interested in the estate being transferred to the purchase-money. Therefore I think that the appeal fails.

COTTON, L.J.:—

I also think that the order appealed from is right. It seems indeed to appear upon the face of the order for sale that the provisions of the *Settled Estates Act* have not been followed. The purchaser's objection is that, if that be so, then, notwithstanding sect. 70 of the *Conveyancing and Law of Property Act*, 1881, he is not safe. In my opinion he is quite safe. It has been urged that that section does not apply where the blot appears on the face of the order; but I see nothing in the 70th section which

makes any such distinction. The provisions of that section being clear, in my opinion we ought to hold them to apply for the purpose of making the purchaser safe, just as much where the blot appears on the face of the order as where it does not.

LINDLEY, L.J.:—

I also think that the decision of the Vice-Chancellor was right. It must be borne in mind that this order was the order of a judge of the proper Court. To my mind everything turns upon that. Sect. 2, sub-s. 18, of the *Conveyancing and Law of Property Act*, 1881, defines "the Court" as meaning Her Majesty's High Court of Justice. The order then was an order made by "the Court," and it appears to me that the words of the 70th section are abundantly sufficient to protect the purchaser against any irregularity in the order. This would not be so if the order were made by the wrong Court; but this order is made by the right Court; and I am of opinion that the purchaser will, by virtue of the 70th section, have a perfectly good title.

Solicitors for Vendors: *Freeman & Bothamley.*
Solicitors for Purchasers: *Ramsden & Austin.*

H. C. J.

In re J. B. PALMER'S APPLICATION.
In re TRADE-MARKS REGISTRATION ACT, 1875.

Trade-mark—Cancelling of Registration—Lapse of Five Years—Registration of Mark not authorized to be registered—Trade-marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5, 10.

P. registered "braided fixed stars" as a trade-mark for matches. After the expiration of five years another manufacturer applied to cancel the registration on the ground that the words could not be registered as a trade-mark, for that "fixed stars" was a name well known in the trade for a particular description of matches before *P.* used the alleged trade-mark, and that the words "braided fixed stars" were only a proper description of a kind of matches made by *P.* under a patent which had recently expired, and which matches were at the time of the registration well known in the trade by that name, and differed from the "fixed stars" formerly known by having a braided stem which was the subject of the patent:—

Held, by *Chitty*, J., that even if the 3rd section of the *Trade-marks Regis-*

C. A.

1882

In re J. B. PALMER'S APPLICATION.

In re TRADE-MARKS REGISTRATION ACT, 1875.

25 Ch D 195

tration Act, 1875, did not make the lapse of five years conclusive evidence that the alleged trade-mark was a proper trade-mark, which, *semble*, it did, it at all events excluded evidence to shew that words which *primâ facie* appeared to be fancy words and proper to constitute a trade-mark were not capable of constituting one. His Lordship therefore declined to hear evidence on the subject, and refused the application.

Held, on appeal, that a mark which is not authorized to be registered as a trade-mark does not acquire the character of a trade-mark by being on the register for five years, and may be removed from the register though that period has elapsed; and that evidence ought, therefore, to have been admitted which went to shew that at the time of the registration the words "braided fixed stars" were merely descriptive of a kind of matches well known in the trade.

Whether a person sued for using a name which has been five years on the register as a trade-mark can defend himself on the ground that it is not a trade-mark, *quære*.

THIS was an application by *Bryant & May*, match manufacturers, to cancel the registration under the *Trade-marks Registration Act*, 1875, of a mark registered by *J. Palmer & Son*.

The mark was advertised in the *Trade-marks Journal* of the 3rd of February, 1877, as follows:—

Trade-mark.	Name, Address, and Calling of Applicant.	Class of Goods.	Description of Goods.	Number given by Registrar.	Date of Application received.	If Mark used prior to 13th Aug. 1875, how long used.
BRAIDED FIXED STARS.	*James Brecknock Palmer*, trading as *J. Palmer & Son, Palace Works*, &c. Match Manufacturers.	47	Matches.	8075	July 13, 1876.	Seven years before July 13, 1876.

and was registered on the 4th of June, 1877.

The application of *Bryant & May* was made in October, 1881, and the case made by the applicants was, that on the 29th of August, 1867, *H. J. Simlick* obtained letters patent for improvements in cigar and pipe-lights, which letters patent were assigned to *Palmer & Son*. That the lights made under this patent had become popular, and were known under the name of "braided fixed stars," under which name *Palmer & Son* had commenced selling them in 1869. That this term was nothing more than an

Application to stay proceedings on the Register pending appeal to H of L refused 5 C 24 Ch D 884 a & fm fm Sunday 5 C 24 Ch D 505

accurate description of them, lights known as "fixed stars" having been a well-known article in the trade before 1869. That *Simlick's* invention consisted in enveloping the stem of the pipe-light with a coating or net of wire by means of a braiding machine, and his patent expired on the 29th of August, 1881, and that the "braided fixed stars" made and sold by the applicants, and which it was not disputed that any one might now make and sell, differed from the "fixed stars" previously used only by having a braided stem.

The application came on to be heard before Mr. Justice *Chitty* on the 22nd of February, 1882.

Aston, Q.C., and *Carpmael*, in support of the application, contended that the term "braided fixed stars" was not a trade-mark in any sense of the term, and ought not to have been registered, and that the 3rd section of the *Trade-marks Registration Act*, 1875, only referred to something which was a trade-mark.

Romer, Q.C., and *Northmore Lawrence*, for *Palmer & Son*, contended that the trade-mark having been on the register for five years *Palmer & Son* were under the 3rd section of the Act entitled to the exclusive use of the term.

[The following authorities were cited: *Raggett* v. *Findlater* (1); *Linoleum Manufacturing Company* v. *Nairn* (2).]

CHITTY, J.:—

This application gives rise to a question which, so far as I know, is not covered by any decision. The question is one of some difficulty and of considerable importance. It brings into consideration the true construction of the 3rd section of the *Trade-marks Registration Act*, 1875. That section enacts, that "The registration of a person as first proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of such trade-mark, and shall after the expiration of five years from the date of such registration be conclusive evidence of his right to the exclusive use of such trade-mark, subject to the provisions of this Act as to its connexion with the goodwill of a business." The exact point

(1) Law Rep. 17 Eq. 29. (2) 7 Ch. D. 834.

BIBL. LONDIN UNIV

C. A. 1882 ~~ *In re* J. B. PALMER'S APPLICATION. *In re* TRADE-MARKS REGISTRATION ACT, 1875. —— Chitty, J. ——

which I have to decide is as to the effect of the words "conclusive evidence of his right to the exclusive use of such trade-mark." It is admitted that Messrs. *Palmer* have been on the register for a period of five years, and consequently the question arises now whether they are not entitled to rely on the registration, and to say their title is altogether unimpeachable.

Now, reading the 3rd section as fairly as I can, I think the true meaning of it is, that registration is to be conclusive evidence of the right to the exclusive use of such trade-mark, or, in other words, that the enactment means not only that the title is not to be brought in question after the lapse of five years, but that the registration shall be conclusive evidence of the right to the exclusive use of the trade-mark; that is, that it carries with it not merely the question of title but also this result, that the trade-mark itself, the thing which has been registered, is to be deemed the absolute property of the proprietor, so that he has an exclusive right to it.

Now the case has been argued very fully, and has led to the consideration of one or two other matters in connection with the true construction of this section. First of all, the particular mark which has been registered, or rather the "special and distinctive word or words" which have been registered are the words "braided fixed stars." The claim to the use of that term as a trade-mark arises with reference to that part of the 10th section of the Act which says that any special and distinctive word or words used as a trade-mark before the passing of the Act may be registered as such under the Act. There is no doubt in my mind that the term "braided fixed stars" is not what I may call demurrable when used as a trade-mark. It is not *primâ facie*, on the face of it, bad. In order to establish that these are not words which could be used as a trade-mark before the passing of the Act with reference to the 47th class, it would be necessary to go into evidence to shew, as has been proposed to be done, that the term "fixed stars" was a term in common use, used by the trade previously to the passing of the Act, and previously, it must also be said, to the Messrs. *Palmer* acquiring the right which they say they have acquired to use the term "braided fixed stars" as a trade-mark.

I quite agree if the term "fixed stars" was known to be in common use before the registration of the words in question that the addition of the word "braided," which is a mere descriptive epithet, would not have made this a good trade-mark. But I hold, on the true construction of the 3rd section, that Messrs. *Palmer* are entitled to say that they have now by the lapse of five years an unimpeachable right to the exclusive use of these words as a trade-mark.

Then the 5th section, upon which the argument has in a great measure turned, contains three cases in which an application may be made to the Court for the rectification of the register. The first is where a person who is not for the time being entitled to the exclusive use of the trade-mark is entered on the register. The next is where there is a refusal on the part of the Registrar to register a person entitled. The third is "if any mark is registered as a trade-mark which is not authorized to be so registered under this Act." It is under the third of these enactments that the application in question is made and supported by the argument which has been adduced before me.

Now it is quite true that the 5th section does not contain any limitation of the time, but it is also to my mind clear that the 3rd section governs the 5th section to some extent. In fact that is necessarily admitted in argument, because with regard to that one of those three cases where a "person who is not for the time being entitled to the exclusive use of a trade-mark in accordance with this Act or otherwise in accordance with law is entered on the register," it is quite clear if the application was made under the 5th section, persons who had been on the register for a period of five years could rely on the 3rd section and say you cannot question my title because the 3rd section says the registration itself is conclusive evidence of that; but that still leaves the point open as to whether the 5th section, as far as regards the particular part of it, namely, "if any mark is registered as a trade-mark which is not authorized to be so registered under the Act," does not override the enactment of the 3rd. I think that would be a very awkward construction. I agree there is some ground for saying that such a construction might be adopted by the Court, but it seems to me that I should not be giving true effect to the

C. A. 1882

In re J. B. PALMER'S APPLICATION. *In re* TRADE-MARKS REGISTRATION ACT, 1875.

Chitty, J.

intention of the Legislature with regard to the 3rd section in so holding.

Now the latter part of the 5th section has been much commented on. "The Court may in any proceeding under this section decide any question as to whether a mark is or is not such a trade-mark." That, it is said, is not subject to the limitation of the 3rd section. I have already disposed of the question which is similar to that in the observations I have already made. But it is noticeable that the same portion of the section goes on to say that the Court may in any proceeding under this section decide "any question relating to the right of any person who is party to such proceeding to have his name entered on the register of trade-marks or to have the name of some other person removed." That portion of the section again clearly must be, and is necessarily, subject to the provisions of the 3rd section, which, it is admitted, must be held to be conclusive on the other question, namely, the question of the title of the person who is so registered.

Now, to deal with the 3rd section again, and a little more on general grounds. It appears to me the meaning of the Legislature was to make the registration after the lapse of five years conclusive evidence of the right to the trade-mark, not only that the title should no longer be impeached, but that it should not be open to any one to say the thing referred to is not a trade-mark. It is not absolutely necessary for the decision of this case to go as far as that. I must rest my judgment on the lower ground by saying that where, as here, the thing registered is not *primâ facie* bad on the face of it, the Act at any rate does not allow evidence to be adduced for the purpose of shewing that the thing is not in point of fact a trade-mark. As I have already said, the trade-mark in this case "braided fixed stars" is not on the face of it demurrable. They are fancy words as applied to matches included in the 47th class, in respect of which the registration has taken place.

But see what safeguards the public have. I put this forward in order to shew that I am quite alive to the argument that a bad trade-mark might get on the register, that is, a thing that is not a trade-mark might get on the register, and the person who is so registered might be able by virtue of this section to assert his

C. A. 1882 — *In re* J. B. PALMER'S APPLICATION. — *In re* TRADE-MARKS REGISTRATION ACT, 1875. — Chitty, J.

title to something, which when the thing is rigidly looked into is no trade-mark at all. That is when it has been inquired into with the assistance of evidence. But see what safeguards the Legislature and the rules (which for this purpose are as good as an Act of Parliament) have provided. By the 17th and 18th rules the Registrar has discretion whether he will register or not, and it is not conceivable that the gentleman who now holds the office of Registrar, or any one who is likely to be appointed his successor, would register as a trade-mark words, which on the face of them, ought not to be registered as such. Take some of the obvious cases put during the argument. At one time it struck me somewhat forcibly that if you found on the register at the end of five years with reference to fermented liquors such terms as "Nourishing Stout" the question would arise, could the Court strike the words out? The answer, on the whole satisfactory to my mind, is this, that the Registrar under the 17th and 18th rules has a discretion, and he is not likely to put down in the register two ordinary English words which are merely descriptive of the qualities of the goods in respect of which the registration is made. He is to register on the expiration of three months if he is satisfied that the applicant is entitled to registration, which must of course carry with it the question whether the thing proposed to be registered is or is not a trade-mark. Then the public have also the great advantage of seeing the advertisements, because the registration is not to take place until three months from the date of the first appearance of the advertisement in the official papers—so that the public and the trade are put on their guard with reference to the application and before the registration itself is made. Then you have the safeguard in the discretion of the Registrar, and, thirdly, after that, you have the long lapse of time. Those are three considerations which I think must be borne in mind in considering this section. On the whole I have arrived at the conclusion that I ought to read, as I do read, the 3rd section as giving an unimpeachable title to Messrs. *Palmer* with reference to the trade-mark.

G. M.

C. A.

Bryant & May appealed. The appeal came on to be heard on the 22nd of April, 1882.

C. A.

1882

In re J. B. PALMER'S APPLICATION.

In re TRADE-MARKS REGISTRATION ACT, 1875.

Aston, Q.C., and *Carpmael*, for the Appellants:—

The registration took place on the 4th of June, 1877, but by the operation of the rules the time is to be reckoned from the 13th of July, 1876, the date of the application to register, the five years therefore expired in July, 1881. *Simlick's* patent being dated the 29th of August, 1867, expired on the 29th of August, 1881, so from that time everybody was at liberty to make and sell these articles; but *Palmer & Co.* having applied in July, 1876, to register "braided fixed stars" as a trade-mark, gave notices at the beginning of September, 1881, that other manufacturers, though undoubtedly entitled to make and sell them, must not call them "braided fixed stars." What are they to call them? They are known to all the trade as braided fixed stars, which is not a fancy name, but the only proper description of them, the difference between them and the "fixed stars" previously known in the trade being that they have braided stems.

[JESSEL, M.R.:—We wish to hear the Respondents on this question. If a set of words which cannot possibly make a trade-mark, such for instance as "best soap," are on the register for five years, must they be retained there?]

Romer, Q.C., and *Northmore Lawrence*, for the Respondents:—

The *Trade-marks Registration Act*, 1875, sect. 10, provides that any special and distinctive word or words used as a trade-mark before the Act may be registered under it. If any set of words are manifestly not special or distinctive the Registrar will not register them, and the object of the Act was that the propriety of the registration should not be called in question after the five years.

[COTTON, L.J.:—The question appears to be whether sect. 3 precludes any inquiry under the 3rd paragraph of sect. 5.

JESSEL, M.R.:—Your difficulty is that sect. 3 can only apply to a trade-mark.]

The object of the Act is to make registration *primâ facie* evidence of the right, and to make five years preclude all questions, thus putting a stop to litigation.

[JESSEL, M.R.:—On what words do you rely as having that effect?]

The words "such trade-mark," in sect. 3, which being referential, must apply to the thing which has been registered whatever it may be. The concluding words of sect. 3 shew that it was not intended to be overridden by sect. 5.

[JESSEL, M.R.:—The power to rectify is an independent power, and I see nothing to limit the time for exercising it.]

If parties could always attack an old trade-mark on this ground sect. 3 would be of little use, and there would be great hardship on the person registering.

[JESSEL, M.R.:—It could not be successfully attacked under sect. 5 unless it was something not capable of being registered as a trade-mark.]

The first part of sect. 5 states three alternatives. We can only be got at under the third, "if a mark is registered as a trade-mark which is not authorized to be so registered under this Act," and we say that the first alternative protects us from the effect of the third. An exclusive right has been gained under the Act, and that precludes any further questions.

[COTTON, L.J.:—I do not follow that. The alternatives are in the disjunctive.]

The Court, at the close of the Respondents' argument, stated that they would give notice if they wished to hear a reply. A reply was not called for, and the appeal was placed in the paper for judgment.

May 4, 1882. JESSEL, M.R.:—

This appeal raises an important question as to the construction of the *Trade-marks Registration Act*, 1875. The Respondents, Messrs. *Palmer*, registered more than five years ago (calculating the period according to the rules made under the Act) as a trade-mark the words "braided fixed stars," in connection with matches. It is contended on behalf of the Appellants that the words "braided fixed stars" in connection with matches do not constitute a trade-mark at all, but are merely words descriptive of a

C. A. 1882 *In re* J. B. PALMER'S APPLICATION. *In re* TRADE-MARKS REGISTRATION ACT, 1875. Jessel, M.R.

kind of matches well known at the time of the registration. That is disputed on the part of the Respondents, and is a matter upon which I give no opinion, because it must depend on evidence as to the use of the words in the trade at the time of the registration. An application was made on the part of the present Appellants to remove this mark from the register on the ground that it was not a trade-mark, and is not authorized to be registered as such under the Act, and the Appellants were prepared with evidence to shew that their allegation as to the words in question being merely descriptive of the goods was correct in fact. But, before any evidence was gone into, the point was taken on the part of the present Respondents that, even assuming those words to be merely descriptive of the goods, and to have been known to be so descriptive in the trade at the time of the registration, so that they could not be properly registered as a trade-mark, yet having regard to the 3rd section of the *Trade-marks Registration Act*, 1875, the Respondents were entitled to have those words treated as a trade-mark, and had acquired an indefeasible title to them though they were never a trade-mark at all.

This point was decided in favour of the Respondents by Mr. Justice *Chitty*, and the present is an appeal from his decision. The case must of course depend upon the wording of the Act. The application is under the 5th section. Now it is a well established rule that in construing Acts of Parliament, as well as other instruments in writing, you are to take the literal construction, unless it is controlled by the context or is so manifestly absurd that it cannot be the true construction. The words of sect. 5 are too plain for argument. Three cases are mentioned in which the register may be rectified. The first case is if the name of any person who is not entitled to the exclusive use of the trade-mark is entered on the register. Then comes the case of a refusal by the registrar to enter a mark on the register, and then there are these words, "or if any mark is registered as a trade-mark which is not authorized to be so registered under this Act." No limitation of time is expressed. I call attention also to the words in the latter part of the section, "The Court may in any proceeding under this section decide any question as to whether a mark is or is not such a trade-mark as is authorized to be

registered under this Act." If there were no other sections, there being no limit as to time expressed in the 5th section, there would be nothing to argue, for this application would be clearly authorized.

But the contention on the part of the Respondents, which succeeded before Mr. Justice *Chitty*, was that the 3rd section contained a limitation as to time. Now, of course, if one section of an Act of Parliament gives a remedy, and another section says that the application must be made within a certain number of years, the two sections must be read together, and the application cannot be made after the expiration of that time, but where the power is given generally without limit, the subsequent section cannot confine the application to a particular period, unless clear expressions to that effect are used. It is clear that the 3rd section does not expressly say that the application under the 5th section shall not be made after five years, but the Respondents contend that the words which I am about to read impliedly have that effect. "The registration of a person as first proprietor of a trade-mark shall be *primâ facie* evidence of his right to the exclusive use of such trade-mark, and shall after the expiration of five years from the date of such registration be conclusive evidence of his right to the exclusive use of such trade-mark." Now what is the meaning of the words, "the registration of a person as first proprietor of a trade-mark?" Does it mean his registration as proprietor of "a mark," or does it mean what it says, his registration as proprietor of "a trade-mark?" I think the literal reading is to be preferred. It is true that the registrar ought not to enter anything which is not capable of being a trade-mark, but he may be deceived, and that is alleged to be the case here. The Registrar of Trade-marks cannot know nor can the Commissioners know the meaning of all technical terms used in a trade. It is not like a case depending merely on the meaning of common English words. Without a knowledge of the trade, it is impossible to say, and I have not myself the slightest idea, whether "braided fixed stars" applied to matches was at the time of the application to register it a trade-mark, or a new term capable of being used as a trade-mark, or whether it was a term used as a description in the trade. I am not in the match trade, nor is the

C. A. 1882 *In re* J. B. PALMER'S APPLICATION. *In re* TRADE-MARKS REGISTRATION ACT, 1875. Jessel, M.R.

Registrar. I say I, because I am the acting Commissioner. The case did not come before me, and if it had I should not have known anything more about it than the Registrar knew. Therefore it comes to this, supposing the Registrar to be deceived into registering that as a trade-mark which is not a trade-mark at all, can it have been intended to give the person who gets it placed on the register a right to enjoy that as a trade-mark which never was a trade-mark? I think not, and, indeed, so far from the reason of the thing being against the literal reading, it appears to me to be in favour of it. It was said on the part of the Respondents, what a hardship it will be to a person who registers, if at the end of five years he does not get an indefeasible title, and how desirable it is to put an end to all litigation. But in favour of whom are these arguments urged? In favour of the person in the trade who knowingly deceives the Registrar, because he being in the trade must know that what he applies to register is not a trade-mark, but a mere description of the goods, and he relies on the ignorance of the Registrar and of the Commissioners of the terms used in that trade to enable him surreptitiously and unfairly to get that registered as a trade-mark which he knows not to be a trade-mark at all. Consider what a hardship it will be on the trade if we accede to the contention of the Respondents. A man who sells his goods, and affixes thereto a device that is a real trade-mark is bound to go and look at the register, and see if anybody else is proprietor of that device, and if he does not he must take the consequences. But if he sells his goods under their proper description, he will never dream that anybody has registered that description as a trade-mark, and he would actually be led into a liability to an action at the suit of a person who was so improperly registered, though no reasonable precaution could have enabled him to discover the existence of such liability. To take an instance so extreme as to be absurd, but which still it is well to take. Suppose a man going into the soap trade, and determining to sell palm oil soap under the name of "palm oil soap." He would never dream of going to the register to see whether anybody has registered the words "palm oil soap" as a trade-mark, he would be selling his goods under their proper description as palm oil soap, and suddenly somebody comes down against

him and says, "I registered those words five years ago as a trade-mark. I therefore change by the force of the Act of Parliament those words which are ordinary words of description into a trade-mark, and now I am entitled to restrain you from using them." If this were to be allowed, it would be allowing a man who had taken an improper advantage of the ignorance of the Registrar, and of the Commissioners if it came before them, as to the use of the technical terms of the trade, to lay a trap for an honest tradesman who had done nothing but sell his goods under their proper description.

It appears to me that reason and convenience are entirely in favour of the construction which we put upon this Act of Parliament. I am glad to see (though I do not know whether it ought to influence us either way) that the well-known writer Mr. *Sebastian* takes the same view of the Act, so that our decision will be no surprise to anyone. He says (*Sebastian* on Trade-Marks (1)): "The registration as a trade-mark of a name of this description will somewhat complicate the question, as such registration is to be *primâ facie* evidence, and after five years' registration conclusive evidence, of the right of the registered owner to the exclusive use of such trade-mark, but this enactment does not preclude a defence on the ground that the name so registered is in fact no trade-mark, and was registered or is continued on the register by error." So Mr. *Bryce* says (*Bryce* on the Trade-marks Registration Acts, 1875 and 1876) (2): "After the expiry of five years the right of the registered proprietor becomes absolute, and cannot be disputed by a defendant. But it is apprehended that after, no less than before, the expiry of the five years, the right of the registered proprietor may be contested on any ground going to shew that the mark ought never to have been registered at all, for example, that it is not a trade-mark within the meaning of the Act." So both writers on the subject take the same view, and go so far as to think that if a description which is not capable of being a trade-mark is registered, a person who sells goods under that description, and is sued, may defend himself on the ground that it is not a trade-mark, though it has been five years on the register. That question has not been argued before us, and we have

(1) Page 33. (2) Page 3.

C. A. 1882

In re J. B. PALMER'S APPLICATION.

In re TRADE-MARKS REGISTRATION ACT, 1875.

Jessel, M.R.

not to decide it, but I am not by any means prepared to say that those distinguished writers are wrong, because that Act only says that after five years the person who has registered a trade-mark shall be entitled to the trade-mark, but does not say that the mark as registered shall be deemed to be a trade-mark.

Under these circumstances it appears to me that the Appellants were right on the question of law, and that the learned Judge ought to have admitted the evidence on the question whether "braided fixed stars" was a description capable of being registered as a trade-mark, or a mere description of a known class of goods. It follows that the appeal must be allowed, and that the case must be remitted to the learned Judge to decide the question of fact.

Lord Justice *Cotton*, who took part in hearing the appeal, but is not present, has authorized me to say that he concurs in the present decision.

LINDLEY, L.J.:—

So do I. I will only add that I have availed myself of the opportunity afforded by the adjournment of the Court of looking into some of the cases which have been decided upon similar provisions in other Acts which render certificates conclusive. Thus, the *Companies Act*, 1862, makes the Registrar's certificate conclusive of the incorporation of a company, but that has been held to be confined to companies capable of being registered. There are other similar enactments which have received a similar construction. After careful examination of sects. 3, 5, and 10 of the *Trade-marks Registration Act*, 1875, I am satisfied that a mark which is not a trade-mark, and which therefore ought never to have been registered, does not become a trade-mark by being on the register for five years.

Solicitors for Appellants: *Wilson, Bristows, & Carpmael.*
Solicitors for Respondents: *Hollams, Son, & Coward.*

H. C. J.

Ex parte MOIR. *In re* MOIR.

C. A. 1882 May 11.

Administration of Bankrupt's Property—Duty of Bankrupt to furnish Accounts —Order to file Cash Account—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 19.

Sect. 19 of the *Bankruptcy Act*, 1869, gives the Court power to order a bankrupt to file a cash account of his receipts and payments for a specified period before his bankruptcy, and, if the circumstances which appear on the file of proceedings shew that such an order ought to be made, the Court can make it without any further evidence.

The Court, however, has a discretion in the matter, and such an order ought not to be made as a matter of course, but only under special circumstances.

Ex parte Crawford (1) approved and followed.

A bankrupt who had been engaged in an extensive business as a promoter of public companies, had kept no accounts, and could produce no record whatever of his transactions, except his bankers' pass-book, and some counterfoils of recent cheques:—

Held, that this was a sufficient reason for ordering him to file a cash account of his receipts and payments for two years before his bankruptcy.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

Alexander Mitchell Moir carried on a large business as a promoter of public companies. On the 18th of October, 1881, a bankruptcy petition was presented against him. On the 4th of November, 1881, he filed a liquidation petition, and an order was made staying the proceedings under the bankruptcy petition pending the decision of the creditors under the liquidation petition. At the first meeting of the creditors under the liquidation petition the debtor produced a statement of his affairs which shewed that his debts amounted to £84,486, and his assets to £21,048. Resolutions in favour of a liquidation by arrangement were passed by the statutory majority, but the registration of the resolutions was opposed, and the result was that some of the proofs used at the meeting were struck out, and the majority was reduced below the statutory amount. The liquidation proceedings thus fell through, and the debtor was adjudicated a

(1) 28 L. T. (N.S.) 244.

C. A. 1882

Ex parte MOIR. *In re* MOIR.

bankrupt. On the 7th of February a trustee was appointed in the bankruptcy.

On the 27th of February, the bankrupt attended at the trustee's office and was examined by him upon his statement of affairs. On the 10th of March he attended again and was further examined. The 17th of March had been fixed for his public examination, and he attended on that day in the Court of Bankruptcy, but on the application of the trustee's counsel, the public examination was adjourned by the Registrar to the 21st of April, on the ground that a private sitting had been appointed for the 30th of March for the examination of the bankrupt. He was accordingly examined on the 30th of March, and the private examination was adjourned to the 19th of April. In the course of his examination on that day he stated that he had never kept any cash book or any other book of account, no pocket book or memorandum book containing entries, and no diary; and that he had no book whatever containing any account of his business transactions. The only book which contained any account of his transactions was his bankers' pass-book. From that book it appeared that his receipts from January, 1880, to November, 1881, had amounted to nearly £40,000. He had the counterfoils of his current cheque book, but no others. He said that he had not destroyed the others, but he did not know where they were. He believed that all large sums which he had received had been paid into his bankers, and that all his large payments had been made by cheques. On the 21st of April he attended the Court of Bankruptcy again for his public examination. The trustee's counsel again applied for an adjournment, and for an order that the bankrupt should file a cash account. The bankrupt's counsel opposed the application, and insisted that the bankrupt ought to be examined. The Registrar ordered the bankrupt, within fourteen days, to file a cash account containing particulars of his receipts and payments from the 1st of January, 1880, to the 17th of November, 1881, and adjourned the sitting for the public examination until the 19th of May.

From this order the bankrupt appealed, asking by his notice of appeal that he might be allowed to pass his public examination. He made an affidavit in which he said that it was impossible for

him to furnish any further or better account than that which was contained in his bankers' pass-book which he had already given up to the trustee, and that he had already given the trustee all the information about his affairs which was in his power.

Cooper-Willis, Q.C., and *F. Cooper-Willis*, for the Appellant:—

The order is an oppressive one; the bankrupt has sworn that he is unable to give any more information.

The order was made without any evidence in support of it.

Under the present *Bankruptcy Act* there is no jurisdiction to make such an order. Under the former Bankruptcy Acts a bankrupt was required to file a cash account only when there was probable ground for believing that he had been making a provision for himself in expectation of bankruptcy, and there was power to grant him an allowance to enable him to procure assistance in making out the account. There is no such power now, and a bankrupt is not likely to have any money to pay for the necessary assistance. Sect. 19 of the *Bankruptcy Act*, 1869, does not apply to an investigation into the antecedent dealings of the bankrupt. There is no power to examine him publicly, except upon his statement of affairs. Rule 92 of the Rules of 1870, and Form No. 39, shew what he is bound to do; when he has done that he has complied with the requirements of the Act.

[JESSEL, M.R.:—Your second and third points were decided against you by the Chief Judge in *Ex parte Crawford* (1).]

That decision is not binding on this Court.

Horne Payne, and *Finlay Knight*, for the trustee, were not heard.

JESSEL, M.R.:—

I have often lamented that there is not a forensic term for impudence. If there was, I should apply it to this bankrupt. He has allowed his counsel to talk of the order made against him as being oppressive.

Now this is the kind of bankrupt we have to deal with—not an

(1) 28 L. T. (N.S.) 244.

C. A. 1882 *Ex parte* MOIR. *In re* MOIR. Jessel, M.R.

ordinary bankrupt—but a man whose business it was to be what is commonly called a promoter of companies. He seems to have carried on a very extensive business, because, on looking at his bankers' pass-book, I find that his receipts were about £40,000 a year. He has become a bankrupt. What does he tell us about his proceedings? He says that he never kept any books. What are we to say to a man carrying on this large business who kept no books? In *France* he would be subject to very severe criminal proceedings for not keeping books. There is no such law in *England*. But, though he escapes criminal proceedings, he is not exempt from censure, and when he becomes bankrupt he must not expect to be treated in the same way as an ordinary business man, who keeps books from which his creditors can ascertain the state of his affairs. The present bankrupt has no right to complain.

Now what does he say about his papers? He has no papers, no counterfoils of cheques, no books of account, no letters from his creditors or his debtors, nor any of the various other documents which he must have possessed regarding the companies which he promoted, shewing the sums which he received and paid. They are lost or destroyed. Not one of them is forthcoming, and he has neither a book nor a paper—nothing in the world, except a few recent counterfoils and a bankers' pass-book. Nobody thanks him for having kept that, because the information contained in it can be obtained from the bankers. Therefore it was immaterial whether it was lost or destroyed. But that is all which he has forthcoming.

He is examined privately by the trustee, and then he comes up for his public examination before Mr. Registrar *Hazlitt*, sitting as Chief Judge, a Registrar of great experience, who knows perfectly well that an order for the delivery of a cash account by a bankrupt ought not to be made except in an extreme case, because it may be used oppressively. A bankrupt ought to have no money, but there are bankrupts who have money, and that is the class of bankrupts which ought most especially to be proceeded against. I do not say it is so in this case. I cannot tell, but all I can say is, that the bankrupt's proceedings are very suspicious and unsatisfactory. That being so, the Registrar, having arrived at the

conclusion that the information is very unsatisfactory, directs the bankrupt to furnish a cash account, and adjourns his public examination. If the Registrar had power to do this, I cannot conceive any order more proper to be made in this case.

The argument adduced against it goes too far. It was said that a bankrupt (and no doubt it is true theoretically) ought to have no money, and therefore cannot do anything. But the Act of Parliament compels a bankrupt to do a great many things which ordinarily cost money, and which, I suppose, in the case of a bankruptcy, will cost money. Whether the Legislature thought that the bankrupt's friends would advance the money or not, I do not know, but it is plain that the bankrupt may be ordered to do an enormous number of things, such as executing powers of attorney, conveyances, deeds, instruments, &c., and that all those things cost money. He may not be competent to read the instrument himself, and he must employ a solicitor, and we know that with very few exceptions a bankrupt always does employ a solicitor. In all cases of bankrupts of this class solicitors are employed, who are paid by somebody, and generally accountants too.

Therefore, when the Legislature made this provision, they knew perfectly well that, somehow or other, bankrupts do find money for all these things, and it is no more an argument against an order to file a cash account, that it will cost money to obey it, than it is against an order to do any of the other things which a bankrupt may be compelled to do. It must be a matter for the discretion of the Judge. I have asked Mr. Registrar *Pepys*, who is here to assist us to-day, and he tells me that the Registrars are very careful about making orders of this kind, as they may entail a great deal of cost upon the bankrupt, and may be used oppressively by the persons who obtain them. They are not common, but uncommon orders, made only under special circumstances.

Now is there such a jurisdiction? Two objections are made. First, it is said that the jurisdiction, if it exists, ought not to be exercised without evidence. That depends upon what is meant by evidence. If the Court sees on the file of proceedings a state of circumstances which calls for the exercise of the discretion, if, without oral testimony or affidavit, facts such as I have stated

C. A. 1882 *Ex parte* MOIR. *In re* MOIR. Jessel, M.R.

appear on the file, that the bankrupt has no documents, and that his statement of affairs, although in the statutory form, does not give sufficient information, I should say that that is sufficient evidence for the Court to act upon. But in this particular case there is other evidence to induce the Court to act, besides which there was a request by the trustee.

The next objection is that the 19th section of the *Bankruptcy Act* does not authorize the Court to make such an order at all. I entirely disagree. The 19th section is expressed in very general terms. The bankrupt is to "do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the trustee" (he was required by the trustee in the present case) "or may be prescribed by rules of Court, or be directed by the Court by any special order or orders made in reference to any particular bankruptcy, or made on the occasion of any special application by the trustee or any creditor." The words "in relation to his property," are very large. They mean anything in the shape of account or statement or anything else which the Court may reasonably require. A discretion is given to the Court, and in my opinion it was intended to give it.

I have only one other observation to make about that. Both these objections were taken as long ago as the 10th of March, 1873, in *Ex parte Crawford* (1), and were overruled by the Chief Judge. He said this, "I cannot permit bankrupts to prescribe to their trustees what accounts they shall have; why they shall not have this or that account; especially where, as in this case, the main reason alleged is that the accounts are somewhat complicated by reason of the suits which are pending in the Court of Chancery of *Lancaster*." It was said in that case that the accounts asked for would be complicated and expensive, but that objection was not allowed to prevail. That case shews what the practice in bankruptcy is and has been ever since.

I will advert to one further objection. The bankrupt has sworn that he cannot furnish any cash account other than what appears in his bankers' pass-book. That, however, does not shew that he cannot furnish an account, because he may be able only to furnish

(1) 28 L. T. (N.S.) 244.

C. A. 1882 *Ex parte* MOIR. *In re* MOIR. Jessel, M.R.

an account of those items. One reading of his affidavit (I am not sure whether it is the true reading) is consistent with his being able to furnish additional particulars. If that is the true reading, the affidavit is no answer at all, because those additional particulars are the very things which are wanted. The bankers' pass-book begins with "cash £2200" one day. Then there is "cash £3500" another day. He can furnish additional particulars about those items. He knows from what source those moneys were furnished, and by whom they were paid. He may furnish most valuable information. If, however, that is not the true reading of his affidavit, all I can say is that I cannot attach credit to it, because it is impossible to believe that the bankrupt cannot give some explanation as to the sources from which these very large sums were derived. I do not intend to impute to him any intention to deceive, but, if you read his affidavit in that way, it cannot be true. Either way, therefore, in my opinion, the bankrupt can furnish a better account than is given by the pass-book.

Moreover, it appears that one of his principal creditors, a person named *Kensington*, is friendly to him. *Kensington* took a bill of sale of his house and furniture. He has since given it up, and he says that he is ready to furnish an account. That shews that one person may assist the bankrupt in giving an account of part of his transactions, and I have no doubt whatever that, if he applied to other creditors and other debtors, he would find that a great many of them had kept books, and would not be unwilling to give him a transcript of their accounts. It cannot be called oppressive to require him to take this amount of trouble. This is the case of a man who has kept no books, and who has destroyed or lost his papers. It is not oppressive to require him to go and ask the persons with whom he has dealt to furnish copies of their accounts with him, and they are the very people who are capable of doing it. But, until he has done something, it will not do for him to say to the Court that he has destroyed or lost every paper he has in the world, that he cannot give any further account, and that you can get it from his bankers' pass-book.

I think the Registrar's order is right, and that the appeal must be dismissed.

C. A. 1882

Ex parte MOIR. *In re* MOIR.

LINDLEY, L.J.:—

I am of the same opinion. The appeal is based first of all on the ground that the Registrar had no jurisdiction to make any such order as he has made.

Now it appears to me that to answer that objection it is only necessary to read sect. 19 of the Act. It has been construed, so far as I know, ever since it was passed, in the way in which it was construed in *Ex parte Crawford* (1), viz., as giving the Registrar ample power to order such an account as this, if, under the circumstances, he thinks it expedient to do so. It is quite right that the Registrar should not make orders for cash accounts as a matter of course, and without consideration. They may be oppressive and often vexatious; and the practice is for the Registrar not to make them, unless he sees some strong ground for doing it. Has the Registrar exercised his discretion properly in the present case? It appears to me plain that he has, and for the reasons which I will state. The bankrupt has no books but his bankers' pass-book. He has made a statement of affairs which is not altogether satisfactory, and further information is wanted. He has been examined more or less in public and in private, and the trustee thinks that further information ought to be given, and so does the Registrar. The bankrupt says, "I cannot give you any better cash account; I can do no more than refer you to my bankers' pass-book." In one sense I can understand that this is true; that is that he cannot do it without taking more trouble than he has yet taken. He cannot do it off-hand, and it is possible that if he were examined item by item, without time for consideration and for obtaining information, he could not give any more information. But that is not what is meant. It is his duty to ascertain what he can, to put himself in a position to give a cash account, if it is required. It appears to me that his mistake is this. He seems to think that he has complied with this order by saying, "I cannot give you a better account than appears in the pass-book." He must try and do the best he can. He cannot be expected to do more. To say that he can do nothing is idle. The trustee is entitled to the best account which the bankrupt can

(1) 28 L. T. (N.S.) 244.

give to the best of his ability, and he must give the best information that he can.

HOLKER, L.J.:—

I am of the same opinion.

The appeal was dismissed with costs, and six weeks were allowed to the bankrupt within which to file the account.

Solicitor for the Appellant: *J. B. Churchill.*
Solicitors for the Trustee: *Emanuel & Simmonds.*

W. L. C.

HILLIARD *v.* HANSON.

[1882 H. 2269.]

Sheriff—Fi. Fa.—Wrongful Seizure—Action—Costs.

Under a writ of *fi. fa.* against a son, the sheriff seized goods of his father, in whose house the son lived. The son had in fact no goods there, except some wearing apparel. The writ was indorsed with a statement that the son lived at a certain address, which was in fact the father's house, though the indorsement did not state this. The father gave verbal notice to the bailiff that he claimed the goods, and the next day the sheriff issued an interpleader summons. Meanwhile the father had commenced an action against the sheriff alone, claiming an injunction to restrain him from remaining in possession, and *Hall*, V.C., without requiring notice to be given to the execution creditor, granted the injunction. The sheriff appealed, and meanwhile the execution creditor, on the hearing of the interpleader summons, had admitted that the goods seized were the father's. No misconduct on the part of the sheriff was proved:—

Held, that the action was premature; that the father ought to have waited to see the result of the interpleader proceedings; and that he must bear his own costs of the motion for the injunction in both Courts:

Held, also, that the Vice-Chancellor ought not to have granted the injunction without hearing the execution creditor, who should have been made a party to the action, or at any rate served with notice of it.

ON the 16th of May, 1882, in an action of *In re Edwards, Hilliard* v. *Paddock*, in the Chancery Division, a writ of *fi. fa.* was issued by the Defendants against *Burton Osborne Hilliard*, the Plaintiff, in respect of costs which he had been ordered to pay and had not paid. The writ commanded the sheriff to levy on

C. A. 1882 HILLIARD v. HANSON.

the goods and chattels of the Plaintiff, and it was indorsed, "The Plaintiff is a solicitor's clerk and resides at 35, *Warwick Road, Maida Hill.*"

The Plaintiff was in fact a solicitor. The house 35, *Warwick Road,* was the house of his father, *Osborne Hilliard,* who lived there with his family. The son slept in the house occasionally. He had no goods there except some wearing apparel. The furniture in the house was all the property of the father. On the morning of the 18th of May the sheriff's officer went to the house and seized some furniture, and left a man in possession. The father gave verbal notice to the man in possession that the furniture in the house was all his property, and requested him to withdraw, which he refused to do. The same day the father issued the writ in the action of *Hilliard* v. *Hanson* against the sheriff alone, claiming damages for an improper seizure and an injunction to restrain the sheriff from remaining in possession, and from proceeding to a sale of the goods. The writ was served on the 19th of May. On the same day the sheriff issued an interpleader summons in the original action calling on the execution creditor and the father to interplead. On the 20th of May the father, by special leave, moved before Vice-Chancellor *Hall* for an injunction in the terms of the indorsement on his writ.

Graham Hastings, Q.C., and *Onslow,* for the Plaintiff.

T. L. Wilkinson, for the sheriff.

HALL, V.C., granted the injunction, and ordered the sheriff to withdraw at once, the Plaintiff giving an undertaking as to damages.

The sheriff at once applied to the Court of Appeal to discharge the order.

May 20. The COURT OF APPEAL suspended the operation of the Vice-Chancellor's order until the 22nd of May, giving the sheriff leave to move on the 22nd of May to discharge the order.

May 22. The COURT OF APPEAL ordered the sheriff to with-

draw, on the terms of the father paying the amount of the levy into Court, and adjourned the further hearing of the appeal. C. A. 1882 HILLIARD v. HANSON.

On the 25th of May the interpleader summons was heard, and the execution creditor then admitted that the goods which had been seized, with the exception of some wearing apparel of small value, were the property of the father and not of the son.

May 26. The appeal now came on to be heard on the question of costs. C. A.

Graham Hastings, Q.C., and *Onslow*, for the Plaintiff:—

The sheriff was a mere trespasser in the Plaintiff's house, and the Plaintiff was justified in bringing the action, and is entitled to the costs. The sheriff ought at any rate not to have remained longer than was necessary to enable him to remove the goods of the son: *Ash* v. *Dawnay* (1).

T. L. Wilkinson, for the sheriff.

JESSEL, M.R.:—

This case is one of considerable importance as regards the practice relating to executions. I think we can do justice without exposing sheriffs to have this kind of action brought against them prematurely. The original action was brought for a debt due by a young man who was living with his father; their names were very much alike, though not quite identical. The creditor recovered judgment in the action and issued execution. The son had some wearing apparel not of much value in his father's house, but he had no other goods there. The execution creditor by his writ in fact directed the sheriff to seize all the goods which were in the house of the father, and the sheriff's officer seized everything which he found there. Thereupon the father gave verbal notice to the officer that the goods which he had seized belonged to him, and not to his son. The usual course, no doubt, is to give a written notice, but still the sheriff's officer had notice. He communicated the notice to his principal, and the next day the

(1) 8 Ex. 237.

C. A. 1882 — HILLIARD v. HANSON. — Jessel, M.R.

sheriff issued an interpleader summons. Meanwhile the father had commenced an action against the sheriff for the wrongful seizure. He had a perfect right to do this. He applied to the Vice-Chancellor for an injunction to restrain the sheriff from remaining in possession and from selling the goods. The sheriff appeared and said that he knew nothing about the matter, but that he had only acted on the instructions of the execution creditor. In the meantime the proceedings in interpleader went on, and in the result it is admitted that the goods which were seized belonged to the father. There is no ground for alleging any abuse of the sheriff's power, or any misconduct on the part of him or his officer. There was no reason, therefore, why, if no action had been brought, the Judge should not on an interpleader issue have made the ordinary order that no action should be brought against the sheriff. When an action has been actually commenced the proper course is to stay all further proceedings in it. That, however, would not dispose of the costs. I think that the Vice-Chancellor ought not to have turned the sheriff out of possession without hearing the execution creditor. The execution creditor should either have been made a party to the action, or notice of it should have been served on him, for it was he who was really disputing the title to the goods. The Vice-Chancellor's order is, however, right in fact, inasmuch as it has turned out that the goods are the property of the father. The sheriff was really a trespasser, and how he can possibly be entitled to any costs I am unable to see. If there had been no interpleader summons, he would have had to pay the costs of the action, as having been in the wrong throughout. But, as he has not acted improperly in any way, I do not think he ought to be deprived of the protection which an interpleader summons was intended to give him, merely because the owner of the goods had commenced his action before the interpleader summons was issued. We ought to shew our disapprobation of the conduct of the Plaintiff in bringing this action so hastily, instead of waiting to see the result of the notice which he gave to the sheriff, by giving him no costs. But we cannot go further than that. The injunction will be dissolved, and no costs will be given of the motion either in this Court or before the Vice-Chancellor.

C. A.
1882
HILLIARD
v.
HANSON.

LINDLEY, L.J.:—

I think the action of the father was vexatious and premature; it was not warranted at all. The right course would have been to wait and see the result of the interpleader. I agree that no costs ought to be given.

By consent an order was then made staying all further proceedings in the action.

Solicitor for Plaintiff: *W. R. A. Kime.*
Solicitor for Sheriff: *W. Maynard.*

W. L. C.

Ex parte POPPLEWELL. *In re* STOREY.

C. A.
1882
C. J. B.
March 6.
C. A.
June 8.

Bill of Sale—Registration—Statement of Consideration—Defeasance or Condition—Agreement not to register—Payment of increased Bonus—Misdescription of Grantor—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.

A bill of sale was expressed to be made in consideration of £242 advanced by the grantee to the grantors, and the grantors agreed to repay the advance, together with a sum of £100 by way of interest and bonus, in certain instalments. There was a verbal agreement by the grantee not to register the bill of sale, in consequence of which he charged a larger bonus for the advance than he would otherwise have done.

Held, that the agreement not to register was a mere collateral agreement, and not part of the consideration for the bill of sale, and that, therefore, it was unnecessary to state it in the deed.

Held, also, that the agreement was not a "defeasance or condition" to which the deed was subject within the meaning of sect. 10 of the *Bills of Sale Act*, 1878.

A bill of sale and the affidavit filed on its registration described the grantors (who were father and son) by their true addresses, and added that they were mantle manufacturers carrying on business together under a specified firm. They had in fact formerly carried on the business of mantle manufacturers in partnership, but, at the time when the bill of sale was executed, the partnership had been dissolved, and the business was being carried on by the father alone, the son being in his employment as a clerk. The property comprised in the deed in fact belonged to the father alone, though both father and son joined in the assignment. The father alone filed a liquidation petition.

Held, that there was no misdescription of the grantors such as to affect the validity of the registration; (1) because, the son not being a bankrupt, any

C. A. 1882

Ex parte POPPLEWELL. *In re* STOREY.

misdescription of him was immaterial; (2) because, as to the father, the statement that he was carrying on business with the son was mere surplusage, and was not misleading.

ON the 26th of November, 1880, a bill of sale by way of mortgage was executed by *James Storey* and *William French Storey* (who was the son of *James Storey*) in favour of *James Frederick Townend*. In the deed the grantors were described as "*James Storey*, of *Hazlehurst*, *Cavendish Road*, *Eccles*, near *Manchester*, and 7, *Red Lion Street*, *Manchester*, and *William French Storey*, of *Hazlehurst* aforesaid, and 7, *Red Lion Street* aforesaid, both mantle manufacturers carrying on business together at 7, *Red Lion Street* aforesaid, under the style or firm of *James Storey*, *Son*, *& Co.*, who together with their heirs, executors, administrators, and assigns, are hereinafter described as and are included in the expression 'mortgagor.'" The deed contained the following recital:— "Whereas the mortgagor hath applied to the mortgagee to lend and advance to him the sum of £242, which he the mortgagee has agreed to do upon the mortgagor agreeing to pay the sum of £100 by way of interest and bonus, and upon having the repayment of the sum advanced and the payment of the said bonus or interest, together making a principal sum of £342, which said principal sum is hereinafter called the 'advance,' secured to the mortgagee in manner hereinafter expressed, and upon having the benefit of any security which the said mortgagee now holds or which may hereafter be given in respect of the said or any other advance by guarantee or otherwise, to which conditions the mortgagor consents."

The bill of sale was on a printed form, in which, as it originally stood, the words "for such loan" followed the words "by way of interest and bonus," but these words were struck out before the execution of the deed. The deed witnessed that, in consideration of the said sum of £242 by the mortgagee paid to the mortgagor "at or before the execution of these presents" the mortgagor did thereby assign unto the mortgagee absolutely all and singular the furniture, fixtures, utensils, &c., stock-in-trade, implements of trade, trade utensils, and other goods, chattels, and effects "of and belonging to the mortgagor now being in, about, and upon (and also the unexpired term of the mortgagor's interest or tenancy in)

the messuage, dwelling-house, shop, and premises of the mortgagor known as *Hazlehurst* aforesaid, and 7, *Red Lion Street* aforesaid or elsewhere," subject to redemption on payment of £342 in certain instalments as therein mentioned. The bill of sale was registered in due time, the affidavit filed on the registration stating the residence and occupation of the grantors in the same terms as they were stated in the deed.

In August, 1881, *James Storey* filed a liquidation petition in the *Manchester* County Court, under which a trustee of his property was appointed. The trustee applied to the County Court to have the bill of sale declared void as against him. He alleged that the consideration for the deed was not truly stated, for that before its execution it was verbally agreed between the grantors and the grantee that it should not be registered; they agreeing in consideration of the non-registration to pay him a larger sum by way of bonus and interest than he would otherwise have required. It was also alleged that the grantors were not properly described in the affidavit filed on the registration. There was evidence that they had formerly carried on the business of mantle manufacturers in partnership together, but that they had compounded with their creditors and that the partnership had been dissolved before the date of the bill of sale, the business being then carried on by the father alone, and the son acting as his clerk or manager, and the property comprised in the deed being that of the father alone. The son resided with the father at the address mentioned in the affidavit. The grantee alleged that prior to the execution of the deed the grantors represented to him that they were carrying on the business in partnership together.

The Judge of the County Court refused the application. The trustee appealed to the Chief Judge. The appeal was heard on the 6th of March, 1882.

Ambrose, Q.C., and *Bradbury*, for the Appellant:—

We object to the bill on the following grounds: 1. The consideration is not truly stated as required by the *Bills of Sale Act*, 1878, sect. 8, as there was an absolute bargain between the parties that the bill of sale should not be registered, and that the grantors should have the sum of £100 deducted from the consideration

C. A. 1882 *Ex parte* POPPLEWELL. *In re* STOREY.

money in the shape of premium or bonus, and this agreement was not outside the agreement for the loan but it was part of the agreement itself: *Hamilton* v. *Chaine* (1); 2. The bill of sale, being given subject to this bargain, which was in the nature of a defeasance or condition not contained in the body thereof, is void because the condition has not been reduced into writing and set forth in the copy filed under the Act as part thereof: *Bills of Sale Act*, sect. 10, sub-s. 3: *Ex parte Southam* (2); *Ex parte Collins* (3); 3. The grantor, *William F. Storey*, is not properly described, as he was not a mantle manufacturer, and not at the time a partner with his father, but merely his clerk or servant. There was accordingly a misdescription in fact, and the trustee is not estopped from raising the objection.

Winslow, Q.C., and *J. M. Yates*, for the Respondent *Townend*, were not called upon.

BACON, C.J.:—

I cannot interfere with the order. The argument before me proceeded upon certain facts which were before the learned Judge, and were dealt with by him, and upon those facts three points have been argued before me. First, it is said that there was an agreement between the parties that this bill of sale should not be registered. Then, extending that a little, it is said that the £100 which was paid for interest and bonus was agreed to be paid in consideration of the forbearance of the money-lender to register his bill of sale. That was before the learned Judge, and was the subject of evidence before him, and he negatives the proof of any such agreement.

[*Ambrose*, Q.C., submitted that this had been rather assumed by the learned County Court Judge.]

I find that he negatived the proof of any such agreement, but if there had been any such agreement there is no necessity for stating in the bill of sale more than is in effect stated. The truth was told in the bill of sale. It is neither a defeasance, nor a con-

(1) 7 Q. B. D. 1, 319. (2) Law Rep. 17 Eq. 578.
(3) Law Rep. 10 Ch. 367.

dition, nor a declaration of trust. By no violence of construction can it be said that it falls within the construction given in the *Bills of Sale Act*, 1878, s. 10, or that therefore it was necessary to state it in the bill of sale. I find it stated honestly and plainly, so that nobody could doubt upon that that it is not a part of the consideration: and with as much skill at least as was necessary to prevent it being considered as part of the consideration the recital in the deed is made plain and distinct, the only consideration, which is fully and truly stated in the deed, being the advance of the £242. The receipt for the money at the back of it is explicit in its terms, and nobody has doubted that the whole £242 was handed over at the time the bill of sale was executed. The recital is that the borrower applied to the mortgagee to lend him £242, which he has agreed to do upon the mortgagor paying the sum of £100 by way of interest and bonus, and upon having repayment secured of the sums advanced and payment of the bonus, making the principal sum of £342. Where is the want of explicitness and distinct truth in that recital? Nobody can impeach it in the slightest degree. Now the Act of Parliament requires that the consideration shall be stated, which means fully and truly stated. The deed is plain in its terms. I cannot conceive that there can be any impeachment of the validity of the bill of sale under these circumstances. I discard the notion that there was a collateral agreement that the bill of sale should not be registered, and if there had been, I say it was not necessary to be inserted in the bill of sale.

Then the other objection to it is that the parties are not properly described in the affidavit. If the two come together and say, "We have or may have some interest in the property," what does it signify to the mortgagee to what degree or extent each of them is entitled to the property which is assigned? I think the description is perfectly just and right, and it is the description which these parties have assumed to themselves. Then when the affidavit is made, in which the description is repeated, the man making the affidavit has the bill of sale before him, and he says that they who were therein described as carrying on business, and so on, executed this deed, and it was duly executed in his presence, and attested by him. Every condition required by the Act of

C. A. 1882

Ex parte POPPLEWELL. *In re* STOREY.

C. J. B.

Parliament is fulfilled and complied with, and there is no ground whatever for disturbing the judgment on that point.

Then the third point is that the property is treated as joint property. Well, these two men had been partners together, and they had compounded with their creditors, the consequence of which was that if the composition was paid, the property which was theirs would remain theirs. The son must have had some interest in that property, and whether he had a large or a small interest, or whatever it was, or whatever accretions had been made to it by the father during the period he carried on business alone, was wholly immaterial. The two men come and say, "Whatever our interest is we will assign it to you to secure this £240." The words are enough to cover every interest which they, or either of them, had. Mr. *Ambrose* says that the words, "or either of them," are not to be found in the deed, and he grounds some argument upon this. I am against him. Whatever interest, large or small, either of them had might have passed by this deed, and, in my opinion, there is nothing which should induce me to say that this is not a perfectly valid bill of sale, and that the judgment pronounced by the learned Judge, who seems to have taken great pains in the matter, is not a right one. In my opinion he came to a right conclusion.

F. G. A. W.

C. A.

From this decision the trustee appealed. The appeal was heard on the 8th of June, 1882.

Ambrose, Q.C., and *Bradbury*, for the Appellant:—

The consideration for the bill of sale is not truly stated; the agreement not to register was part of the consideration, because on account of that agreement the grantors agreed to pay a larger bonus than they would otherwise have paid. The consideration was £242, plus the agreement not to register. The real bargain was for a bill of sale which should not be good against all the world, but which should in certain events be invalid. There was one entire contract: *Hamilton* v. *Chaine* (1).

The agreement not to register was also either a defeasance or

(1) 7 Q. B. D. 319.

condition, defeating or qualifying the operation of the bill of sale in the event of the bankruptcy of the grantor, or in the event of an execution being levied on the goods, and, therefore, by sect. 10 (1) of the Act, it ought to have been set forth in the copy of the deed filed on the registration: *Ex parte Collins* (2); *Ex parte Southam* (3).

The description of the grantors is incorrect. The son was not then a mantle manufacturer, and the father and son were not carrying on business in partnership.

Moreover, the grantors are together described as "the mortgagor," and the property assigned is the property of "the mortgagor," *i.e.*, only joint property. The goods were really the property of the father alone, and did not therefore pass by the deed.

Winslow, Q.C., and *J. M. Yates*, for the grantee, were not heard.

JESSEL, M.R.:—

This is one of the many applications under the *Bills of Sale Act* of 1878, and if ever there was a case of splitting straws it has

(1) Sect. 10 provides that "A bill of sale shall be attested and registered under this Act in the following manner (*inter alia*):—

"(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed with the Registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed.

"(3.) If the bill of sale is made or given subject to any defeasance, or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

(2) Law Rep. 10 Ch. 367.

(3) Law Rep. 17 Eq. 578.

C. A. 1882 *Ex parte* POPPLEWELL. *In re* STOREY. Jessel, M.R.

been in some of the decisions under that Act and the prior Act of 1854. Of course the Act was intended to give reasonable information to those who deal with persons who have executed bills of sale, but it was not meant to be a mere trap for those who advance money on such securities. It is the duty of a Judge to construe the Act fairly; but on the other hand, he ought not to adopt a literal construction when it would lead to an absurdity. In the present case *James Storey*, one of the grantors of a bill of sale, has filed a liquidation petition. His son *William French Storey*, the other grantor, had no interest in the goods comprised in the deed. He had formerly been in partnership with his father, but the partnership had been dissolved, and it is alleged that the son was then occupying a subordinate position in the employment of his father. *Townend*, the grantee, is a money-lender. He alleges that the father represented to him that his son was in partnership with him, that he would not consent to have the bill of sale registered, and that higher terms were charged for the loan because the bill of sale was not to be registered. In the result, a bill of sale was given for £342, of which £100 was to be paid by way of interest and bonus (not for the loan, for those words are struck out of the printed form) but by way of interest and bonus generally.

The first point raised is, that the consideration for the bill of sale is untruly stated, because the agreement not to register was part of the consideration, and ought, therefore, to have been stated in the deed. What is it which the Act requires to be stated? It says that the bill of sale "shall set forth the consideration for which such bill of sale was given." The agreement not to register was a collateral agreement. The consideration for the deed was the £242; that was what the grantors got for giving the bill of sale. The agreement not to register was the motive which induced the grantors to consent to pay an additional bonus, but it was not part of the consideration for the deed. If it had been inserted at all in the deed, it would have been by way of a covenant by the grantee not to register the deed. It might as well be argued that every covenant in a deed is part of the consideration for it.

Then it was argued, that if the agreement not to register was

not part of the consideration for the deed, it comes within subsect. 3 of sect. 10 of the Act as being a "defeasance or condition not contained in the body" of the deed. Is it a defeasance? As I have always understood, a "defeasance" is something which defeats the operation of a deed, but is contained in some other deed or document. If it is contained in the same deed it is called a condition. The agreement in question is not contained in any other document, for it was a parol agreement. It cannot, therefore, be a defeasance. Is it a condition? A condition is something which defeats or qualifies an estate. It is argued that the agreement not to register the bill of sale, if carried out, might defeat its operation in certain events, that is, in case of the bankruptcy of the grantor, or the case of an execution being levied on the goods. That is not so, nor was it ever intended by the parties; it was never intended to defeat the estate as against the grantee. The object was to protect the grantors' credit. They did not want to protect their creditors. It is an incident of the Act that it might defeat the grantee's security, but it would have been entirely contrary to the intention of the parties if the agreement had been inserted in the deed. It is not a condition, it is a mere collateral agreement, and it is not within either the words of the Act or their fair meaning.

The other point is certainly a most singular one. It arises in this way. *James Storey* is properly described by his residence and occupation. His son, who is joined with him as a grantor, is properly described as to his residence, but his occupation is described as that of a mantle manufacturer, and it is said that he, having ceased to be in partnership with his father, and having become a clerk in his father's employment, is not properly described as a mantle manufacturer. Before considering whether this is a mis-description, we must see whether it is material. If the requirements of the Act are complied with by the father being properly described, we need not consider whether there is any misdescription of the son. Now what does the Act say? It says that the affidavit made on the registration shall give "a description of the residence and occupation of the person making or giving" the bill of sale. This is part of the registration, and if the bill of sale is not duly registered it is to be void as against

C. A. 1882 *Ex parte* POPPLEWELL. *In re* STOREY. Jessel, M.R.

the trustee in bankruptcy of the person whose goods are comprised in it. Who is the person against whose creditors the bill of sale is to be void if the Act is not complied with? *James Storey.* He is the bankrupt, and it is against his trustee that the deed is to be void. Who was "the person making or giving" the bill of sale? *William French Storey,* the son, joined in the deed, but he had nothing to give; he had no interest in the property comprised in the deed. His description is therefore immaterial. The Act means that the bill of sale must be duly registered *quoad* the person whose credit will be affected by it, and the joinder in it of a person who had no interest in the goods and had nothing to convey is mere surplusage. Is the description which is given of *James Storey* right? It is said that it is not, because he is described as carrying on business with his son. But all that the Act requires is that there should be a description of the residence and occupation of the grantor. Is the father's occupation the less truly described because the affidavit goes on to say that he is carrying on business in partnership with his son? I think not. Those words are mere surplusage. The additional words are in no way misleading in this case; if they were, it might be necessary to consider whether they could cut down the effect of the prior correct description. It appears to me that the father was sufficiently described, and I think we should be straining the words of the Act if we were to hold that the additional words render the previous description untrue.

One other point was suggested. The two grantors are described together in the deed as "the mortgagor," and then the assignment is of all the furniture and other chattels "belonging to the mortgagor," and it was said that, because they are thus described and included in the word "mortgagor," they are to be tied together, and the assignment is to be read as applying only to those chattels which belong to them jointly, and cannot therefore have any operation when one of them owns all the property and the other owns none. Suppose that instead of being included under the term "mortgagor," both of the grantors had been separately named in the assignment, would any lawyer doubt that the whole of the property belonging to them or either of them would pass by the assignment? It is quite plain that

the whole of it would pass. The whole property must equally pass when the two grantors are, to avoid repetition, described under one word. I notice this argument, though it was only faintly urged, because it is the duty of a Judge to notice every argument which is addressed to him. I think that the decision ought to be affirmed, and that the appeal should be dismissed.

LINDLEY, L.J. :—

I also am of opinion that the bill of sale is valid as against the trustee in the liquidation of *James Storey*. We need not consider what would have been the result if *W. F. Storey* had been a bankrupt.

The first objection is that the consideration for the deed is not truly stated in it. The consideration stated is the sum of £242, advanced by the grantee to the grantor, and the grantor agrees to pay £100 by way of interest and bonus, and the sum of £342 is secured by the deed. As I understand it, the sum of £242 was actually advanced by the grantee to the grantor, and that in ordinary parlance is called, and I think rightly called, the consideration for the bill of sale. It is said that there was another consideration, viz., the promise of the grantee not to register the bill of sale. I do not think that is so. I think the consideration was the sum which is stated as such. We must look at the words of the Act, and I think we should be straining them if we were to hold that this agreement not to register was part of the consideration for the deed. It was part of the bargain between the grantor and the grantee which resulted in the consideration being given, but it was not part of the consideration itself.

The next point taken is that the bill of sale was subject to a defeasance or condition because there was this agreement not to register it. The agreement was obviously not a defeasance. Was it a condition? I think not. Upon this point *Ex parte Collins* is a valuable authority. In that case Lord Justice *James* made these important observations (1): "The Act does not say that a bill of sale shall be invalid if it does not contain a true representation of the transaction, it simply puts a registered bill of sale on the footing on which an unregistered one stood before

(1) Law Rep. 10 Ch. 372.

C. A. 1882 *Ex parte* POPPLEWELL. *In re* STOREY. Lindley, L J.

the Act. If this transaction had taken place before the Act, is there any doubt that the creditor would have had all the rights which are in terms given him by the bill of sale? The bill of sale is framed so as to conceal a fact which would have been very damaging to the debtor's credit, viz., that he agreed to give £30 for a loan of £100 for three months; but there is no such false recital as the debtor could take advantage of."

So here, as I understand the Act, it is not necessary that the bill of sale should state every part of the bargain between the parties, and this is a mere collateral agreement.

With regard to the alleged misdescription, the son is not a bankrupt, and if we construe sects. 8 and 10 of the Act together, as I think we ought to do, I am of opinion that the residence and occupation which must be stated are those of the bankrupt or execution debtor, and not those of some other person. There is no misdescription of the liquidating debtor in the present case, his residence and occupation are properly described. There is this addition, "carrying on business together" at the address which is mentioned. Supposing this meant that the father and the son were then carrying on business in partnership together, does it render the previous description of the father's residence and occupation incorrect? It is mere surplusage, and it is not shewn to have been in any way misleading or to have misled anyone. Of course, there might be additional words which would be misleading, and in such a case it might well be that the description would not satisfy the requirements of the Act. The other objection is really the same thing in another shape.

BOWEN, L.J.:—

I am of the same opinion, and I have nothing to add.

Appeal dismissed with costs.

Solicitors for Appellant: *F. Venn & Co.*, agents for *Ritson & Grundy, Manchester.*

Solicitor for Respondent: *D. Warde,* agent for *J. Sims, Manchester.*

W. L. C.

Ex parte HUGGINS. *In re* HUGGINS.

C. A.
1882
June 15.

"Property" of Bankrupt—Vesting in Trustee—"Salary or Income"—Pension of Retired Civil Servant of Crown—Retired Judge of Crown Colony—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 4, 15, 17, 88, 89, 90.

11 QBD 92

The effect of sects. 15 and 17 of the *Bankruptcy Act*, 1869, is to vest in the trustee in a bankruptcy all the "property" of the bankrupt of whatever nature, including the matters dealt with by sect. 23 and sects. 87 to 95, but subject to the exceptions and qualifications introduced by those sections.

The pension of a retired Judge of a Crown colony, granted by the Secretary of State for the Colonies, and voted annually by the Legislature of the colony, is, in case of the bankruptcy of the Judge, "property" which vests in the trustee in the bankruptcy, but it is "income" of the bankrupt within sect. 90 of the *Bankruptcy Act*, 1869, and is subject to the power thereby given to the Court to determine how much of it shall be set aside for the benefit of the bankrupt's creditors.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

The bankrupt, Mr. *H. J. Huggins*, had been Chief Justice of the colony of *Sierra Leone*, to which office he was appointed in 1877. He had previously held the office of Assistant Judge from 1866. He retired in the year 1879, and a pension of £875 per annum was granted to him. He returned to *England*, and afterwards entered into partnership with *W. W. Horner* in the business of manufacturers of bottle-washing machines. The business proved unsuccessful, and Mr. *Huggins* was adjudicated a bankrupt. The trustee in the bankruptcy applied to the Court for an order declaring that the bankrupt's pension vested in the trustee as part of the property of the bankrupt, or, in the alternative, that the trustee should receive from the Treasury or the Crown agents for the colonies the amount of the quarterly instalment of pension due on the 1st of April, 1882, or such part thereof as to the Court should seem just and reasonable, and that the trustee should receive until the further order of the Court the future quarterly instalments of the pension, as they might from time to time become due and payable, or such portion of each such quarterly instalment as to the Court might seem just and reasonable.

In answer to a request by the Court, addressed to the Secretary

C. A. 1882

Ex parte HUGGINS. *In re* HUGGINS.

of State for the Colonies, the following statement was made by his directions in two letters from the Colonial Office to the Registrar.

"There is no statute or ordinance of the settlement of *Sierra Leone* regulating the granting of pensions to persons having held offices in the service of the settlement, but in *Sierra Leone*, as in other Crown colonies in which there is no local statute on the subject, retiring pensions and compensation allowances on abolition or resignation of office, payable out of the revenue of the colony, are awarded by the Secretary of State. The pensions and allowances so awarded are placed on the annual estimates of the colony, and voted annually by the Colonial Legislature, and are included under the appropriate general heading in the Annual Appropriation Ordinance of the colony. The pensioner may draw his pension either from the Colonial Treasury in the colony, or from the Crown agents who act as agents for the colony in this country.

"The Secretary of State in granting pensions and in determining the conditions on which they are held, is guided in general by the provisions of the Imperial statute, 4 & 5 Will. 4, c. 24, and the Superannuation Acts, 1859 and 1876, and the practice of the Lords Commissioners of the Treasury in the administration of these statutes, but subject to such variations as the Secretary of State may from time to time consider to be required by the conditions of colonial service, or by circumstances of particular colonies.

"Mr. *Huggins* has not since the time when his pension was granted been liable to be called upon to fill any public office or situation under the Crown. The Secretary of State, in accordance with the practice of the Treasury in relation to pensions granted to persons who have served in the Civil Service in *England*, has declined to recognise assignments of colonial pensions."

The Registrar made an order containing the declaration asked for, and he ordered that the bankrupt should be restrained until further order from receiving the moneys payable to him in respect of the pension, and that the trustee should receive from the Treasury or the Crown agents for the colonies the amount of the

quarterly instalment of the pension due on the 1st of April, 1882, and until the further order of the Court the future quarterly instalments of the pension, as they should from time to time become due and payable.

The trustee offered on the hearing of the application to assent to the bankrupt receiving for his maintenance £350 per annum out of the pension.

The bankrupt appealed from the order.

The trustee's offer was repeated on the hearing of the appeal.

Cooper Willis, Q.C., and *S. Woolf*, for the Appellant:—

The pension is not assignable, and neither the Colonial Office nor the government of the colony can be compelled to pay it, and it does not vest in the trustee. Nothing passes to a trustee in bankruptcy but that which is assignable at law, and recoverable by legal process. It has been held that payments such as the half-pay of officers in the army or navy cannot be assigned, because a duty attaches in respect of them, and that it would be contrary to public policy that the officer should be deprived of his means of subsistence. Such pensions therefore do not vest in an assignee or trustee in bankruptcy. In the same way it has been held that pensions receivable from the *East India Company* did not pass to the assignee in bankruptcy of the pensioner, and were not attachable as a debt under a garnishee order: *Gibson* v. *East India Company* (1); *Innes* v. *East India Company* (2); *Ex parte Hawker* (3). In the same way pensions granted to government officers under the provisions of 4 & 5 Will. 4, c. 24, do not on the bankruptcy of the pensioner pass to his assignee: *Wells* v. *Foster* (4).

There is no contract to pay the pension which can be enforced by any legal process. It is, therefore, a payment by way of bounty merely, and such a payment does not pass to the trustee: *Ex parte Wicks* (5); *Cooper* v. *The Queen* (6). Such a pension as this is included in either sect. 89 or sect. 90 (7) of the *Bankruptcy Act*, 1869.

(1) 5 Bing. N. C. 262.
(2) 17 C. B. 351.
(3) Law Rep. 7 Ch. 214.
(4) 8 M. & W. 149.
(5) 17 Ch. D. 70.
(6) 14 Ch. D. 311.
(7) Sect. 88 provides that "Where a bankrupt is a beneficed clergyman,

C. A. 1882 *Ex parte* HUGGINS. *In re* HUGGINS.

If the things mentioned in those sections vested absolutely in the trustee the provisions therein contained would be unnecessary, he would have only to ask that the allowance or pension should be paid to him. But those provisions shew that such payments do not vest in the trustee; on the contrary he is obliged to come to the Court for an order for payment to him, and in case of income derived from Government the consent of other persons is required.

[JESSEL, M.R.:—The group of sections 87 to 95 is headed "As to property devolving on trustee."]

That which vests in the trustee in a bankruptcy as provided by sect. 17, and which by sect. 15 is divisible among the creditors, is the "property of the bankrupt," and sect. 4 says that "property shall mean and include money, goods, things in action, land, and every description of property, whether real or personal; also obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising

---

the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of *levari facias* founded on a judgment against the bankrupt . . . . but the sequestrator shall allow out of the profits of the benefice to the bankrupt, while he performs the duties of the parish or place, such an annual sum, payable quarterly, as the bishop of the diocese in which the benefice is situate directs."

Sect. 89. "Where a bankrupt is or has been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the Civil Service of the Crown, or is in the enjoyment of any pension or compensation granted by the Treasury, the trustee during the bankruptcy, and the registrar after the close of the bankruptcy, shall receive for distribution amongst the creditors so much of the bankrupt's pay, half-pay, salary, emolument or pension as the Court, upon the application of the trustee, thinks just and reasonable to be paid, in such manner and at such times as the Court, with the consent in writing of the chief officer of the department under which the pay, half-pay, salary, emolument, pension, or compensation is enjoyed, directs."

Sect. 90. "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the Court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof to the trustee during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied by him in such manner as the Court may direct."

out of or incident to property as above defined." Such a pension as that of the appellant does not come within this definition, and the provisions of sects. 89 and 90 shew that it does not pass to the trustee under sects. 15 and 17. At any rate the Court has power to say how much of the pension shall be paid to the trustee, and the bankrupt ought to have a larger sum left for him than the £350 which the trustee has offered.

Winslow, Q.C., and *C. J. Ruscombe Poole*, for the trustee.

[JESSEL, M.R.:—Have you any objection to an order declaring that the pension vests in the trustee, subject to the power of the Court under sect. 90 to set aside a part of it for the bankrupt, and then directing that so much be set aside for him?]

Winslow:—No. But there may be some difficulty in obtaining payment from the paymaster unless the bankrupt assents.

Cooper Willis:—The bankrupt will assent.

[JESSEL, M.R.:—That must be stated in the order.]

The trustee's counsel was not further called on.

JESSEL, M.R.:—

This case has been argued with great energy, and I can understand this, for I have great sympathy with this unfortunate gentleman. He went to a colony not remarkable for its salubrity; he filled the office of a judge there for several years, and on his retirement he received a grant of a superannuation allowance for his past services. When a man is appointed to an office of this kind he is told that he will receive a salary of such an amount and that on his retirement he will be entitled to a pension, and he accepts the office on those terms. Possibly the exact amount of the pension may not have been mentioned in this case, but the Appellant accepted the office partly in consideration of the pension. Having retired from his office and having returned to this country, he was induced to enter into a bottle-washing speculation, and the result was, what might have been expected, it has brought him to ruin and bankruptcy. The only question now is whether his creditors in the bottle-washing business are entitled

C. A. 1882 *Ex parte* HUGGINS. *In re* HUGGINS. Jessel, M.R.

to take the pension which he has so hardly earned to pay the debts which he has contracted with them. It is a case for great sympathy, and if the trustee in the bankruptcy had come to the bankrupt and said, I will have all your pension whether you like it or not, we should have known how to deal with it. But the trustee has very properly offered to allow the bankrupt £350 a year for his maintenance. The question is whether that offer ought to be accepted. It has been argued, first, that this pension is not "property" of the bankrupt. I think it is. It is true that the contract under which he accepted the office may not be enforceable in the Courts either of this country or of *Sierra Leone*. I think that is so. But that does not decide the question. There are many cases in which property arises from a contract, quite independently of the fact that no judicial tribunal can enforce it. Take the case of the bond of a foreign Government, which is a contract by the foreign Government to pay a sum of money. Such a contract is not enforceable in the Courts of this country, and probably it is not enforceable anywhere. The contract of a Government is not enforceable in the Courts of another country, because they have no jurisdiction over a foreign Government, and no sovereign power would allow itself to be sued in the Courts of its own country without its own consent. Still no one would say that the bond of a foreign country is not property.

If a man died possessing nothing but French or Italian bonds no one would say that he had died without any property. Such bonds are not *choses in action* in the ordinary sense, and that cannot be the definition of property. The mere fact that you cannot sue for the thing does not make it not "property." I am not going to attempt to define "property," that would be too dangerous. But there can be no doubt that these foreign bonds, both in common language and in the language of lawyers, are "property." Nor can I doubt that if a man had a bond for £10,000 of the British Government it would be "property." The annuities which were granted by the kings of England in former days, charged on the tonnage and poundage dues, were always dealt with as property, and they formed the subject of numerous decisions of the Courts. But you could not sue the Crown for them, and they could not even be made the subject of a petition of right, because they were

granted out of the voluntary bounty of the Crown. But still they were property and they were assignable. A Government pension for past services was certainly assignable in equity, if not at law. It is said that in the present case the pension cannot be obtained until it has been voted by the Colonial Legislature. That is no answer. The voting by the Legislature is the mere form or mode of securing the payment. It is not as if the Appellant had been told when the office was offered to him, You will be entitled to a pension when you retire, accordingly as it is or is not voted by the Colonial Legislature. If he had been told that, he would probably not have accepted the office. The vote of the Legislature is merely the mode of ascertaining the annual sum which the colony has to pay. Just in the same way the salaries and pensions of servants of the Crown in this country cannot be paid until they are voted by Parliament, and yet no one would say that they are not the property of the persons who receive them. There are, no doubt, some salaries and pensions which are not assignable. But when this is so it is always referable to one of two grounds. It is said to be contrary to public policy that payments made to induce persons to keep themselves ready for the service of the Crown, as the half-pay of officers in the army or navy, or payments for actual service rendered to the Crown, should be assigned. The other class of cases is that of pensions, like the retiring allowance of a beneficed clergyman, which are by statute expressly made not assignable. But still I think these are all property. The large definition of "property" given in sect. 4 of the *Bankruptcy Act* goes far beyond *choses in action.* My view of the meaning of the provisions of the *Bankruptcy Act* is this. Sects. 15 and 17 vest all the "property" of the bankrupt in the trustee, but this vesting is subject to exceptions such as that which is made by sect. 23 of leases and onerous contracts which the trustee is authorized to disclaim. The "property" vests by virtue of sects. 15 and 17, but subject to the exceptions made by subsequent sections of the Act. The series of sections beginning with sect. 87 and ending with sect. 95, is prefaced by the words "As to property devolving on trustee." The proceeds of executions, which are dealt with by sect. 87, would clearly vest in the trustee but for

C. A. 1882

Ex parte HUGGINS. *In re* HUGGINS.

Jessel, M.R.

the provisions of that section. Then sect. 88 deals with the case of a beneficed clergyman who may become a bankrupt. No doubt the interest of a clergyman in his benefice is property, but it was not alienable by our law. The effect of sects. 15 and 17 would have been to make the property of a bankrupt clergyman in his benefice, so far as the profits are concerned, vest in the trustee in his bankruptcy. But it would not have done to make no provision for the performance of the duties attached to the benefice, and therefore sect. 88 was inserted in order to make provision for this. Therefore, in the case of a beneficed clergyman, sects. 15 and 17 must be read as subject to the provisions of sect. 88, and the benefice does not vest in an unqualified way in the trustee. Then comes sect. 89, which provides for the cases of officers in in the army or navy, and officers or clerks in the civil service of the Crown. In such cases sect. 15 is controlled by sect. 89, and a person who holds such a position and who becomes a bankrupt, is not necessarily to be left to starve, however improvident he may have been, but a discretion is given to the Court to fix how much of his pay and salary is to be made available for the payment of his creditors. If this be so, why do not the cases which are dealt with by sect. 90 stand in a similar position? Sect. 90 applies to a bankrupt "who is in the receipt of a salary or income other than as aforesaid." The present Appellant's income is not a "salary," but it is "income." The word "income" is as large a word as can be used. It is not the less "income," because it has to be voted every year by the Colonial Legislature. The Court is empowered to "make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee." That means that, though the salary or income would vest in the trustee by virtue of sects. 15 and 17, the Court may order that only a part of it shall be set aside for the benefit of the creditors. This is a specific provision which to that extent controls the operation of sects. 15 and 17. I think, therefore, that the trustee in this case applied to the Court for the right order, *i.e.*, for a declaration that the bankrupt's pension had vested in him, and then a direction what proportion of it should be set aside for the payment of the creditors. It is not necessary for us

to consider what proportion of the pension should be left for the support of the bankrupt, inasmuch as the trustee has made a fair and liberal offer.

LINDLEY, L.J. :—

The object of the appeal is, as I understand it, to induce the Court to say that the Registrar's order is wrong *in toto*, and that the pension which the bankrupt enjoys is not in any way available for the benefit of his creditors. It is suggested that this pension is not "property of the bankrupt" within the meaning of sect. 15, that it is not such a pension as comes within sect. 89, and that it is not "income" within the meaning of sect. 90, because it is payable at the will of the Colonial Legislature. It is necessary to look closely at the various sections of the Act. Now, sect. 4 defines the word "property" by way of inclusion. Sect. 17 vests in the trustee "the property of the bankrupt," which by sect. 15 is defined as being "the property of the bankrupt divisible amongst his creditors." Sect. 15 gives the particulars which that property comprises. We are dealing, therefore, not with "property" in the abstract, but with the property which is divisible amongst the creditors under the Act. Now sub-sect. 3 of sect. 15 says that such property shall comprise "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him during its continuance." There is no limit to the "continuance" of the bankruptcy, except its closing under the provisions of sect. 47. All money, therefore, to which the bankrupt may become entitled in any manner during the continuance of the bankruptcy is within sect. 15. Then, looking a little further, we find a group of sections, sects. 87 to 95, which relate to "property devolving on the trustee." As I understand them, these sections are modifications and qualifications of sect. 15. The different kinds of property with which they deal vest in the trustee, but subject to the modifications and qualifications contained in this group of sections. Sects. 89 and 90 are the only ones which are material for the present purpose. Is this bankrupt "in the receipt of a salary or income other than as aforesaid?" His pension is not a "salary," inasmuch as he is not

C. A. 1882

Ex parte HUGGINS. *In re* HUGGINS.

LINDLEY, L.J.

bound to render any services in respect of it. But why is it not "income?" Surely it is income in every sense of the word. It is not, as in *Ex parte Wicks* (1), a mere voluntary allowance, revocable at any time; it is not an arbitrary allowance which can be stopped at any time at the will of the person who pays it. In my opinion it is within the true meaning of the word "income" in sect. 90. The only fault of the Registrar's order appears to me to be that its language is a little too general. Literally construed it would mean that the trustee is entitled to receive the whole of the pension without any qualification. We shall put that right by declaring that the pension vests in the trustee subject to the power given to the Court by sect. 90.

BOWEN, L.J.:—

I am of the same opinion.

JESSEL, M.R.:—I suppose the trustee will not ask for costs?

Winslow:—He will be entitled to costs out of the estate.

MINUTE OF ORDER:—Declare that the pension vests in the trustee subject to the provisions of sect. 90. The bankrupt by his counsel consenting, vary the Registrar's order by directing that the trustee do receive the future quarterly instalments of £525, part of the bankrupt's pension, and that the bankrupt do receive the future quarterly instalments of £350, the balance of the pension. Injunction to restrain bankrupt from receiving the £525. No order as to costs, except that deposit be returned to Appellant.

Solicitors for Appellant: *Pattison, Wigg, & Co.*
Solicitors for Trustee: *Scott & Barham.*

(1) 17 Ch. D. 70.

W. L. C.

In re HIGGINS AND HITCHMAN'S CONTRACT.

V.-C. H.
1882
Jan. 31.

Vendor and Purchaser—Restrictive Covenant—Railway Company—Superfluous Lands—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 127, 128.

Upon delivery of the abstract by a vendor who had contracted to deduce a good title in fee simple, it appeared that one of his predecessors had covenanted in his purchase deed not to use the property (which was a semi-detached villa standing on an eighth of an acre in a residential neighbourhood) or any part of it for the purpose of gasworks or a public-house:—

Held, that this was such a restriction upon the user and enjoyment of the property as to constitute a fatal objection to the title.

A railway company selling its superfluous land is at liberty to impose such restrictive conditions upon the user and enjoyment of the land as may most conduce to their advantage as vendors, and there is nothing in the *Lands Clauses Consolidation Act*, 1845, to deprive them in this respect of the rights of ordinary vendors.

BY agreement, dated the 2nd of December, 1880, *J. S. Higgins* agreed, in consideration of certain purchase-moneys, part whereof was to be paid on the signing of the agreement, to sell to *J. Hitchman* "the fee simple in possession" of a freehold messuage, being a semi-detached villa known as *St. Joseph's Villa, Park Road, St. Leonards*, standing on rather less than an eighth of an acre, and to deduce a good title thereto; and the agreement contained a clause in the ordinary form providing that if the purchaser should insist on any objection or requisition which the vendor should be unable or unwilling to remove or comply with, the vendor might by notice in writing annul the sale on repayment of the deposit money only. Upon delivery of the abstract it appeared that the parcel of land on which the villa stood had been purchased in April, 1848, by the *South Eastern Railway Company* from the Corporation of *Hastings* and the trustees of the *Magdalene Charity*, and that in the year 1862 the company sold it (with other lands) to one *Stephen Putland*, who was the predecessor in title of *J. S. Higgins*, the present vendor. The conveyance from the company to *Stephen Putland* was dated the 27th of March, 1862, and thereby, in consideration of £200, the company conveyed unto *Putland* and his heirs to uses in bar of dower "all that parcel of freehold building land situate," &c., . . . and contain-

V.-C. H. 1882 *In re* HIGGINS AND HITCHMAN'S CONTRACT.

ing thirty-nine perches. And *Putland*, for himself, his heirs, executors, administrators, and assigns, covenanted with the company, their successors and assigns, that he, his heirs, or assigns, would not at any time build on the said piece of land more than two dwelling-houses the net first cost of which should be less than £600 sterling, and (*inter alia*) that the frontage of any dwelling-houses should be set back in a particular manner, and "that the said plot or piece of land thereby conveyed should not at any time thereafter be used for the purpose of erecting thereon any gasworks, public-house, or beerhouse, nor should any building that might thereafter be erected thereon be used for any such purpose." Mr. *Hitchman*, the intending purchaser, then delivered requisitions upon the title, amongst which was one objecting that the covenants in the conveyance of the 27th of March, 1862, as to the user of the land were so restrictive as to derogate from the rights of an owner "in fee simple in possession"; and the vendor not being able to remove this objection, the purchaser took out a summons under the *Vendors and Purchasers Act*, 1874, which was now adjourned into Court.

Kekewich, Q.C., and *Shebbeare*, for the purchaser in support of the summons, contended that the vendor was bound under the contract to deduce a good title in fee simple in possession to the property, and that the existence of covenants restricting the full enjoyment of the property, such as a covenant not to use it for the purpose of gasworks or a public-house, was a fatal objection to the title.

Street, for the vendor:—

The property comprised in this contract is a semi-detached villa standing on land with a frontage of forty-four feet, and a depth of 110 feet—*i.e.*, on less than an eighth of an acre. So that it is inconceivable that gasworks would ever be erected upon it, and if they were they would constitute a nuisance; nor could the property, from its residential character, be converted into a public-house. The covenant, therefore, even if binding, is immaterial, and does not diminish or affect the value of the property. But the covenant is not binding. A railway company holding land is

not in the position of an ordinary proprietor, for it has no right permanently to devote its land to any purposes other than those of the railway. And if the land is (as here) superfluous land, the company must comply with the provisions of the 127th and 128th sections of the *Lands Clauses Consolidation Act*, 1845. That is to say, unless the land is within the exception in sect. 128, they must offer it, just as they bought it, to the original or adjacent landowner; and when they sell it, they must sell it absolutely, without reserving in themselves any right or interest whatever, or imposing upon the land any burden or condition to which it was not subject when they acquired it: *Great Western Railway Company* v. *May* (1); *Lord Beauchamp* v. *Great Western Railway Company* (2); *Mulliner* v. *Midland Railway Company* (3); *In re Metropolitan District Railway Company and Cosh* (4). Here the railway company could not have bought, and cannot retain, an interest in themselves that this property should not be used for gasworks or a public-house, and accordingly the covenant, however onerous it may be, is not binding.

HALL, V.C.:—

I am unable to adopt the views of the vendor upon either of these points. The contention is that the covenant is one which, if valid, may be disregarded, upon the ground that it cannot affect the value of the property, and also because, if acted upon, it is merely directed at something which could be otherwise dealt with as being a nuisance.

I cannot entertain for a moment either of those contentions. That the property should be converted into gasworks is probably out of the question, and so it is not necessary to take that point into consideration; but as regards its conversion into a public-house, I cannot say that the property, or a part of it, might not be advantageously converted into a public-house, either by the present or some subsequent owner. It is urged that the proximity of the property to houses of a superior character negatives the possibility of this occurring. But I cannot agree to that. On the contrary, it is very usual to find a public-house in close

(1) Law Rep. 7 H. L. 283.
(2) Ibid. 3 Ch. 745.
(3) 11 Ch. D. 611.
(4) 13 Ch. D. 607.

V.-C. H. 1882 *In re* HIGGINS AND HITCHMAN'S CONTRACT.

proximity to large houses of a good class, and in fact owing its existence to that very proximity. And I cannot disregard this covenant as one which can have no practical operation with reference to this property. That being so, it seems to me that there is a fetter upon the use and enjoyment of this property, such as a purchaser, who may, for aught I know, want it for that very purpose, is not bound to submit to, and such as, in my opinion, constitutes a fatal objection to the title.

With regard to the second point, it is said that the railway company had no power to impose upon the property the burden of restrictive covenants of this character, and to sell lands subjected to the obligations of such covenants, and accordingly that the sale must be taken to be made free from the covenants as if they had not been inserted in the conveyance. Another view that might be presented would be that the sale by the railway company was bad altogether, and that no title could be acquired thereby. But in fact there is, in my opinion, no ground whatever for saying that a railway company selling its superfluous lands is not to be at liberty to sell them in the way that is most advantageous to itself, and with such conditions as to user as may most conduce to their advantage. In that respect they have the same rights as ordinary owners, and, like them, may say to a purchaser, "In order to improve the value of our property, if you purchase our land you must only build houses of a certain class, and subject to such and such restrictions." And there is nothing in the Act of Parliament to prevent their doing this like ordinary vendors.

The cases referred to by Mr. *Street*, in which companies had sold subject to easements or with reservations, have nothing in common with the present case. I cannot, in the absence of express authority, hold that such restrictions as are found here are to be disregarded and treated as nothing, and therefore I must consider that the purchaser of this property would be subject to be called upon to observe and comply with them by the railway company, and probably by the owners of other parts of the property which have been sold by the company (for it may be that these restrictions have been imposed upon the property for the common benefit of all the purchasers from the company),

either personally in their own right, or through the medium of their vendors.

I say nothing as to whether these are covenants which do or do not run with the land, but I do hold that personal engagements and rights have arisen affecting the owners of the property for the time being, and that the purchaser, if he accepted the title, would be at the risk of a possible user by him of his property being called in question as being one different to and at variance with that to which, according to the provisions of his conveyance, he was entitled. And upon that ground I sustain the objection.

Kekewich, Q.C., then asked for an order rescinding the contract, and giving the purchaser the costs of investigating the title, or, if the Court felt any difficulty about rescission, an order for return of the deposit, with the costs of the summons.

Street contended that the Court had no power to order rescission, the vendor having under the contract a right to rescind, of which the Court would not deprive him.

HALL, V.C.:—The vendor can only rescind the contract upon payment of the deposit. That being so, treating the vendor as asking not to be deprived of his right to rescind, he must return the deposit. As to the costs, the purchaser is, upon the whole, in the right, and therefore the vendor must pay the costs of the summons, and of this adjournment into Court. The only remaining question is as to the purchaser's costs of investigating the title.

Kekewich, Q.C.:—That question is settled by *Bain* v. *Fothergill* (1).

HALL, V.C.:—I doubt the jurisdiction, but I shall order those costs also to be paid by the vendor.

Solicitors: *Houghtons & Byfield; W. H. Hughes.*

(1) Law Rep. 7 H. L. 158.

W. W. K.

V.-C. H.

1882

Feb. 20.

ATKINSON *v.* ANDERSON.

[1878 A. 17.]
[1880 A. 0135.]

Proceeds of Real Estate in Court—Petition by Natural Children of an Englishman domiciled in Rome—Status—Succession Duty Act, 1853 (16 & 17 *Vict.* c. 51), *s.* 10 [*Revised Ed. Statutes, vol. xi., p.* 597].

J. A., a native of *Cumberland*, went about forty years before his death in 1877 to reside in *Rome*, and there acquired a Roman or Italian domicil. He cohabited with an Italian woman, by whom he had four children, sons, all born in *Rome* prior to 1862. The parents were never married. *J. A.* inherited real estate in *England*. By his will, made in English form, he gave all his real estate whether in *Italy* or *England* to his four children, *nominatim*. The will was not valid in regard to his personal estate in *Rome*, but as he had acknowledged his natural children in his lifetime they were allowed to succeed to that estate as *heredes ab intestato*. The real estate in *England* was sold and the proceeds paid into Court:—

On petition by the children for distribution of the fund, *held*, that their *status* was that of strangers in blood to the testator, and that the Crown was entitled to be paid 10 per cent. duty under the *Succession Duty Act*, 1853.

THIS was a petition by the four natural children of *James Anderson*, praying for the distribution of a fund in Court, the proceeds of sale of certain real estate situate in *Cumberland*. The principal question raised was whether the duty payable under the *Succession Duty Act*, 1853 (16 & 17 Vict. c. 51), should be at the rate of 1 or 10 per cent. *James Anderson* was a native of *Cumberland*. He left *England* prior to October, 1839, and went to reside in *Rome*, and there carried on business as a photographer under the name of *Isaac Atkinson*, being desirous that his friends should not know where he was located. He resided in *Rome* down to the time of his death, and acquired an Italian or Roman domicil. He never married, but cohabited with an Italian woman, by whom he had four children, sons, all born in *Rome* prior to the year 1862. In 1870 the Papal States were annexed to the kingdom of *Italy*, and became subject to the government of King *Victor Emmanuel*. In the certificates of baptism of three of the children the names of the parents were given, but in the certificate of baptism of the second child they were not given. The mother died many years

ago. The four children were acknowledged and treated by *James Anderson* as his own, and he paid for their maintenance and education.

In December, 1876, *James Anderson* made a will in the Italian language leaving his property equally between his four sons, naming them. This will was invalid according to the law of *Italy* because it was not executed before a notary; and it was invalid according to the law of *England* because it was not signed by the testator in the presence of two witnesses. *James Anderson* died on the 28th of February, 1877. On that day he made a will in English form and gave unto his four natural sons, naming them, all his property whatever, landed or real, in *Italy*, in *England* or elsewhere, equally between them. He appointed executors, and they proved the will in May, 1877. *James Anderson* at the time of his death was entitled to real estates situate in *Cumberland*. An action of ejectment was brought in 1878 to recover possession of the estates. Subsequently and after much litigation a compromise was come to under the sanction of the Court and in accordance with the terms agreed upon. The estates were sold for the sum of £8000 and the money was paid into Court to the credit of the action.

According to the law of the Papal States and of *Italy*, natural born children who have been recognised by their parents are entitled to right of succession. By the law of *Italy* a formal recognition is required, by the law of the Papal States any recognition is sufficient.

James Anderson having died intestate as to his personal estate and leaving no other than the four children named, they were admitted to succeed as *heredes ab intestato* to his personal estate in *Rome*—they having been sufficiently recognised by him as his natural born children, and they now asked by their petition that the fund in Court should be ordered to be paid to them.

Hastings, Q.C., and *H. Greenwood*, for the Petitioners:—

The question is what is the rate of duty payable under the *Succession Duty Act*, 1853, sect. 10, and it is submitted that it should be only 1 per cent., the children standing in the relation of lineal issue of the testator. The case is governed by the decision

V.-C. H. 1882 ATKINSON v. ANDERSON.

in *Skottowe* v. *Young* (1), where it was held that the proceeds of land in this country given by a British subject domiciled in *France* to his children born of a French mother before marriage, but afterwards legitimated according to French law, should pay only 1 per cent. The question is one of *status*, and except as to heirship to land it depends on the law of the domicil. In *In re Goodman's Trusts* (2) a child born before the marriage of her parents, who were domiciled in *Holland*, but legitimated according to the law of that country, by the subsequent marriage of the parents, was held entitled to personal estate in this country as one of the next of kin. The decision in *Wallace* v. *Attorney-General* (3) is also in point. The Petitioners' claim to their father's personal estate in *Rome* was admitted. According to the law of that country they were his heirs—he acknowledged them, and their *status* was recognised by the Roman Courts and the right of succession was granted. The Petitioners cannot be said to be strangers in blood to the testator. They have been admitted to succeed as his children, which is equivalent to "lineal issue," and therefore the duty should be 1 per cent.

Vaughan Hawkins, for the Crown:—

I submit that the duty payable in this case is 10 per cent. The Petitioners might have obtained rights in *Rome* as acknowledged natural children, but they could only have got them in this country by the parents subsequently marrying, and they were never married. The decisions in *Skottowe* v. *Young* and *In re Goodman's Trusts* are not disputed. They shew that where by the law of a foreign country a *status* of legitimacy has been acquired, the Courts here will accept it. The question which arose in those cases does not, however, arise here. But in this case the Petitioners did not acquire the *status* of legitimacy in *Rome*, they were merely the recognised natural children of their father. This is clear by looking at clauses 743 and 744 of the Italian Code. By the former it is provided that natural born children shall only succeed where their parentage is recognised, and by the latter that where their parentage is recognised and there are legitimate

(1) Law Rep. 11 Eq. 474. (2) 17 Ch. D. 266.
(3) Law Rep. 1 Ch. 1.

children they shall take half of what they would have been entitled to if they had been legitimate. The Papal law differs from the Code only in so far as the recognition of the children need not be a formal one. The Petitioners have failed to prove that they are legitimate, and therefore they are strangers in blood. Even if the Petitioners could shew that they are, according to the Italian Code, legitimate, they would have to pay 10 per cent., because they take this fund, the proceeds of real estate, under an English will, and they must, I submit, prove that they are legitimate children according to the law of *England*. The cases which have been referred to were decisions in respect of personal estate. The questions of *status* and of legitimacy must be kept distinct: *Doglioni* v. *Crispin* (1).

Hastings, in reply:—

The decision in *In re Goodman's Trusts* (2) is good for every purpose. If the children are treated as legitimate abroad they must be so treated in this country; and it makes no difference whether the fund for distribution arises from real or personal estate.

Speed, for the purchaser of the estates.

HALL, V.C.:—

The question in this case has been very elaborately and ably argued. It is no doubt one of considerable importance and difficulty. I have to determine what is the *status* of the Petitioners. The argument on their behalf has been that they are not strangers in blood to the testator. It has not been contended that they are his children in the ordinary sense of the word, but that though not his children they are persons who according to the law of *Rome* may be described as being children who are capable of taking, and who have in fact taken, property as his natural children. They have taken property in *Rome* which belonged to the testator, having been recognised there as being his natural children—being as such, by the law of the country governing the succession to property, entitled to take it. It appears to me that

(1) Law Rep. 1 H. L. 301.

(2) 17 Ch. D. 266.

V.-C. H. 1882 ATKINSON v. ANDERSON.

I must, in construing the *Succession Duty Act*, 1853, determine the meaning of the last branch of sect. 10 according to what should be the interpretation to be put upon it by the Court. Looking at the facts as to the *status* of the Petitioners, I consider that it has been clearly proved that they were not born in wedlock, and that subsequently to their births their parents never became man and wife. That being so, according to the law of *England* they are unquestionably strangers in blood to the testator. There is nothing whatever to shew, for the purposes of the statute, nor indeed in any sense, that the Petitioners are in any other position than that, and the fact that they have been, by the law of their country, allowed to take the property of their father, as being his natural children, does not in my opinion, on the construction of the statute, make them anything else than strangers in blood. This seems to me to be the plain result of the evidence and the law in regard to their *status*, and I cannot recognise that, because of their being the natural children of the testator, there is some degree of relationship between them and him—their father—which should prevent their being held to be, for the purposes of the statute, strangers in blood to him, and therefore that they do not come within the last clause of the 10th section of the statute. That, in my opinion, is their position or character according to the law of *England*, and nothing has been shewn which enables me to say that under the statute they are entitled to succession to this fund in any other. That which the Petitioners obtained possession of in a foreign country, they got according to the law of that country, and they have no other *status*. I hold as regards the fund in Court that the Petitioners are strangers in blood to the testator, and that the Crown is entitled to be paid 10 per cent. duty.

Solicitors: *A. C. Lewis; Solicitor for Inland Revenue; Nicol, Son, & Jones.*

T. F. M.

In re BANNERMAN'S ESTATE. BANNERMAN *v.* YOUNG.

[1881 B. 3380.]

V.-C. H.
1882
March 20.

Will, Construction of—Gift of "clear yearly sums," "free from all deductions" —Income Tax deducted by Trustees—Annuitant entitled to Payment of all Sums deducted.

A. B., in 1846, gave to his wife annuities or clear yearly sums for her life "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing, whatsoever," and directed the trustees to appropriate and invest a sufficient part of his personal estate as a fund for the purpose of paying them. The trustees, acting upon the advice of counsel, deducted from all the payments to the widow the income tax:—

Held, that the widow was entitled to be paid the annuities in full, free from any deduction; and also entitled to be paid all the sums which had been deducted.

Lord Lovat v. *Duchess of Leeds* (1) followed.

SPECIAL CASE, under Rules of Court, 1875, Order XXXIV., Rule 1.

Alexander Bannerman, who died in June, 1846, by his will made on the 14th of April, 1846, after giving certain legacies to his wife, the Plaintiff, made a further gift to her in the following terms:—

"I give and bequeath unto my said wife one annuity or clear yearly sum of £400 for and during the term of her natural life, free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing whatsoever, to be paid by equal quarterly payments." After giving certain directions as to the time and mode of payment of the annuity, and providing for the determination of it in the events in the will mentioned, the testator made a further gift to his wife in these terms:—"And I do hereby give and bequeath unto my said wife and her assigns one other annuity or clear yearly sum of £600 for and during the term of her natural life in

(1) 2 Dr. & Sm. 62.

V.-C. H. 1882 *In re* BANNERMAN'S ESTATE. BANNERMAN *v.* YOUNG.

case she shall so long continue my widow and unmarried, free from all such deductions as aforesaid, and to be paid to her or her assigns by the several quarterly payments and at the times hereinbefore directed of and concerning the said annuity of £400."

The executors had, in compliance with the directions of the testator, appropriated and set apart and invested what they deemed would be a sufficient sum, £25,000, to provide out of the income thereof for the payment of the two annuities; and they had out of the income paid to the Plaintiff the annuities free from all deductions, taxes, charges, assessments, and impositions, except income tax, but income tax they had, acting upon the opinion and advice of counsel, which they took shortly after the death of the testator, deducted. In consequence of certain recent decisions, questions arose as to whether the executors had acted rightly in making a deduction for income tax, and if they had not, whether the Plaintiff was entitled to be paid the sums so deducted, and if so, for how long? The Plaintiff who was, down to November, 1878, ignorant of her rights, as alleged, in reference to the income tax, had since that date claimed a right to be paid the annuities in full without any deduction whatsoever; and also the payment of all sums which had been deducted from time to time since the death of the testator. Under the residuary bequest in the will numerous parties had become entitled, and their interests were represented by the Defendant *Peter McLaren*, who had been for the purpose appointed by an order made in August, 1881. The Defendant *Peter Young* was the surviving trustee of the testator's will.

The questions were whether, upon the true construction of the will, the Plaintiff was entitled to be paid the two annuities free from deductions in respect of income tax; and if she was, whether she was entitled to be paid the deductions already made in respect of income tax, and if so, for how many years past, and in case she had a right to such payment of the tax deducted, or of any part thereof, out of what fund or how such payment was to be made; and how the costs were to be provided for.

It was mentioned that of the income derived from the £25,000 there had been an annual surplus, after payment of the annuities, which amounted to upwards of £1800.

Everitt, Q.C., and *Stirling*, for the Plaintiff:—

It is submitted that the Plaintiff is, on the decisions in the cases of *Lord Lovat* v. *Duchess of Leeds* (1) and *Festing* v. *Taylor* (2), entitled to be paid the annuities in full, without deduction for any tax whatsoever. The words of the will are very large and cover income and all other taxes. Assuming that in this case there is a trust, then the Plaintiff is entitled, on the authorities of *Playfair* v. *Cooper* (3) and *In re Ashwell's Will* (4), to be paid all the sums which have been deducted from the date of the first payment of the annuities in 1847, and she should not be restricted to six years, the *Statute of Limitations* being no bar in this case. The executors have clearly acted under a misapprehension of the rights of the Plaintiff, and she is entitled to be paid the sums claimed by her and out of the accumulated fund.

Hastings, Q.C., and *Grosvenor Woods*, for the Defendants:—

The Plaintiff is not entitled to be paid the annuities free from the deduction of income tax. Such was the advice of counsel given to the executors in 1847, and they acted upon it, without any remonstrance from the annuitant. There is no express gift here to the annuitant of the income tax, and that is the true test whether it should be deducted or not: *Turner* v. *Mullineux* (5), though in that case Vice-Chancellor Sir *W. Page Wood* considered that the testator had himself interpreted the word "deductions" as extending to income tax. The decisions in *Lord Lovat* v. *Duchess of Leeds* and *Festing* v. *Taylor*, in which there were other considerations, are not consistent with the decisions in *Wall* v. *Wall* (6); *Lethbridge* v. *Thurlow* (7); *Sadler* v. *Rickards* (8) and *Abadam* v. *Abadam* (9), which should be followed here, as they were in the case of *Attorney-General* v. *Shield* (10). These cases clearly shew that although an annuity is directed to be paid free from deductions, still it must bear the charge of income tax. And it is submitted that it has properly been and should be deducted

(1) 2 Dr. & Sm. 62.
(2) 3 B. & S. 217.
(3) 17 Beav. 187.
(4) Joh. 112.
(5) 1 J. & H. 334.
(6) 15 Sim. 513.
(7) 15 Beav. 334.
(8) 4 K. & J. 302.
(9) 33 Beav. 475.
(10) 3 H. & N. 834; 28 L. J. (Ex.) 49.

V.-C. H. 1882 *In re* BANNERMAN'S ESTATE. BANNERMAN v. YOUNG.

here. As to the question of time, should it be held that the annuitant must be paid in full, the Defendants contend that the deductions made should not be paid for more than six years. The case of *In re Ashwell's Will* (1) is distinguishable in this respect, that there a payment was made on account of the annuity; but the correctness of the decision has been observed upon by Lord *St. Leonards* in his book on the Real Property Statutes (2). The executors acting upon the advice of counsel, and on the faith that the widow was satisfied that the investment would be sufficient, parted with the residue, and therefore if the answers to the questions should be in her favour, there ought to be no order making the executors liable for any payment.

Everitt, in reply, referred to *Ballard* v. *Marsden* (3), and stated that the accumulated fund would, as understood by the parties, be sufficient to pay all arrears and the costs of the special case.

HALL, V.C.:—

Soon after the income tax was imposed there certainly was a notion prevailing that by reason of the provisions of the statute 5 & 6 Vict. c. 35, applicable to cases of contract, a testator could not provide at all for a person having an annuity clear of income tax. In the case of *Lord Lovat* v. *Duchess of Leeds* (4), the opinion which had been entertained was considered and examined into, and the decision of Vice-Chancellor *Kindersley* was, I believe, understood to change that which had been the prevailing notion in the profession, and to determine that the rule was after all this:—Whether or not an annuity should be free from any deduction for income tax must depend upon the meaning of the words used by the testator, *i.e.* if upon the true construction of the words the Court considered that it was intended by the the testator that the annuitant should have the specified annuity without the tax being first deducted, there was no rule of law to prevent effect being given to that intention. The question, therefore, in every case is one of construction of the language of the

(1) Joh. 112.
(2) 2nd Ed. p. 137.
(3) 14 Ch. D. 374.
(4) 2 Dr. & Sm. 62.

will. Arguments have been addressed to the Court as to the exact meaning of the word "deduction." They were in effect that income tax is not a deduction, but a payment to be made by the recipient of the annuity, *i.e.* being such recipient the annuitant is the proper person to pay the tax. It was submitted that the object and purpose of the statute imposing income tax was for the better adjusting taxation, and that the liability to the charge should fall on the right person—the person who was in the actual enjoyment of the annuity—in other words, that the object and purpose of the statute were to make everybody pay the tax in proportion to the sums which he was receiving and expending. Looking at the present "special case," and considering it as one of construction of the will, I find in the statement agreed upon that the testator gave to his wife "one annuity or clear yearly sum of £400 for and during the term of her natural life, free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing whatsoever." And afterwards he gave her "one other annuity or clear yearly sum of £600 . . . . free from all deductions as aforesaid," for her life or widowhood. The trustees of the will were to receive the whole income of their testator's estate, and having it in their hands, they were to pay to the Plaintiff these two clear yearly sums free from all deductions in respect of any present or future taxes whatsoever. It was suggested that the multitude of words so thrown in by the testator are not sufficient to enable the widow to receive the annuities clear of deduction for income tax; that the trustees were the persons who would be called upon by the revenue authorities, and who would have to pay the income tax before paying the annuities—that they would have to pay the sum deducted to the collector of the revenue and then pay her the annuities less the tax, varying, it might be, from two to ten per cent. No one but a very astute lawyer would think that that was what the testator really meant. In my opinion the testator meant that his wife should have a clear yearly sum of £1000. At the time when he made his will there was no tax which could be indicated as meant by him except the income tax. That is the only tax at which the language naturally pointed, and no one but a lawyer would think of construing his

V.-C. H. 1882

In re BANNERMAN'S ESTATE. BANNERMAN *v.* YOUNG.

language as not extending to this tax. I find in this case very much the same language as was used in *Lord Lovat* v. *Duchess of Leeds* (1), and there Vice-Chancellor *Kindersley* was of opinion that there was no difficulty in speaking of income tax as a tax "affecting the hereditaments," that it literally fell within those words, giving to them their technical and proper construction. To my own mind it is perfectly plain that the trustees, deducting income tax from the annuities, as they have in fact done, have thereby rendered them to the Plaintiff, not as clear yearly sums "free from all deductions . . . . whatsoever," according to the language of the will. They have been paying her something less than clear yearly sums, deducting a sum on account of a payment which it was not legally necessary for the testator specifically to exclude by using the words "less income tax." I think the testator used words which are sufficient to cover that, or which are equivalent thereto. There may be some decisions which are opposed to this view, but I think that the balance of the authorities predominates in favour of holding, as I do, that the Plaintiff is entitled to the annuities free from any deduction for income tax, or in other words, that the trustees should have paid her £1000 in full discharge of them, and that they should have paid the tax. The result is that I answer the first and second questions in the affirmative, and that as regards the second that the Plaintiff is entitled to be paid all the sums which have been deducted from the beginning of the payments of the annuities. These sums must be paid out of the accumulated fund in the hands of the surviving trustee, which I understand is more than sufficient to pay them, and to provide for all future payments in full. It is not at present necessary to say anything as to what will have to be done should the fund become exhausted. Such a question may not arise. The costs of all parties must be paid out of the same fund.

Solicitors: *Murray, Hutchins, & Stirling; Cunliffe, Beaumont, & Davenport.*

(1) 2 Dr. & Sm. 62.

T. F. M.

PRESTNEY *v.* MAYOR AND CORPORATION OF COLCHESTER AND THE ATTORNEY-GENERAL.

V.-C. H.
1882
April 21, 22, 26.

[1880 P. 2078.]

Municipal Corporation—Action against, by Freemen on behalf—Property of Borough applied for individual Benefit of Freemen—Custom of Borough—Municipal Corporations Act, 1835 (5 & 6 *Will.* 4, *c.* 76), *s.* 2 [*Revised Ed. Statutes, vol. vii. p.* 911]—*Pleading.*

In an action by some (on behalf of all) of the freemen of a borough to establish the right of all the individual freemen to share for their private benefit the net proceeds of certain properties vested in the corporation:—

Held, on demurrer, that the effect of the saving of rights in sect. 2 of the *Municipal Corporations Act* of 1835 was to legalise the beneficial interests therein mentioned, without reference to the legality of their origin, and, in particular, to obviate any objection which might otherwise arise in respect of the tendency towards a perpetuity of any such beneficial interest.

An action to establish such rights as aforesaid may be brought by parties claiming to be entitled, without an information by the Attorney-General.

In such an action it was held on demurrer that in order to enable the Plaintiffs to avail themselves of such saving of rights as aforesaid, it was sufficient for them, after stating the title of the corporation by charter or otherwise to the property in question, to aver that at the time of the passing of the Act the rents, tolls, and profits claimed by them were not, nor ever had been, nor ought to have been, held and applied to public purposes, but then were, and always had been, held and applied for the particular benefit of the freemen, and without pleading that such rents, tolls, and profits had been enjoyed or acquired by virtue of any specific statute, charter, by-law or custom, or expressly to aver that any custom to such effect as aforesaid existed.

DEMURRER.

The action was brought by three freemen of the borough of *Colchester* on behalf of themselves and all other freemen of the borough, in order to obtain declarations that the corporation were possessed of three specific properties only upon trust for the freemen of the borough; to have accounts taken of the receipts of the Defendants in respect of these properties; and to obtain an order for the payment into Court by the Defendants of the total amount of such receipts, after giving the Defendants credit for all reasonable outgoings.

The three properties which the Plaintiffs alleged to be held in

V.-C. H. 1882

PRESTNEY v. MAYOR AND CORPORATION OF COLCHESTER AND THE ATTORNEY-GENERAL.

trust for them were, first, the rents and profits of the *Colne Fishery* and of the anchorages, water banks, customs and tolls of the River *Colne*; secondly, the rents and profits of the *Severalls* and *Mylands* estates, in the county of *Essex*, amounting together to about 1013 acres; and, thirdly, the rents and profits of *Colchester Market* and of certain annual fairs in April, July, and October, called respectively the *Tailors Fair*, the *New Fair*, and *St. Dennis Fair*. And the statement of claim, after alleging that the borough of *Colchester* was a royal manor in the time of *William the Conqueror*, and setting out a number of Royal Charters whereby the properties in question had been granted by divers of the sovereigns of *England* from King *Richard* I. down to King *George* III., together with an Act of 31 Geo. 2 for regulating the *Colne Fishery*, averred that under and by right of such charters respectively, and as to the said fishery, of such Act, the Defendants now were, and the corporation from time immemorial had been, seised in fee simple of these several properties, and were and had been in receipt of the rents and profits thereof for the benefit of and in trust for the freemen of *Colchester*, and that such rents and profits at the time of the passing of that Act were not, and never had been, applied to public purposes, but were, and always had been, applied for the particular benefit of the freemen, but that nevertheless the Defendants had for many years refused so to apply the same.

The statement of claim treated separately each of the three properties above mentioned and in the above order. It set out the title of the corporation to each of them, and the three statements of title each concluded with an averment in similar terms; that as to the *Colne Fishery* being as follows:—

"15. Under and by virtue of the charters aforesaid, and particularly of the said charter of King *George* the Third, and of the said Act of Parliament" (meaning thereby the local Act above mentioned), "the said Defendants now are, and the said corporation from time immemorial has been, seised in fee simple of the said *Colne Fishery* hereinbefore and in the said Act of Parliament referred to, and of the anchorages, water banks, customs, and tolls of the River *Colne* and its streams from *North Bridge* to *Westnesse*, and are and have been in receipt of the rents, tolls, and profits

thereof for the benefit of, and upon trust for, the free burgesses or freemen of the said borough of *Colchester;* but the Defendants refuse and neglect to account for the said rents, tolls, and profits upon the footing of such trust, and to apply the same for the benefit of the said free burgesses or freemen.

"16. The said rents, tolls, and profits at the time of the passing of the said Act of the 5th and 6th years of King *William* the Fourth" (the *Municipal Corporations Act*), "were not, nor ever had been, nor ought to have been, applied to public purposes, but then were, and always had been, held and applied for the particular benefit of the free burgesses or freemen of the said borough of *Colchester*, but nevertheless the Defendants now neglect and refuse, and for many years past have neglected and refused, so to hold and apply the same."

To this statement of claim the Defendants demurred, on the ground that the action should have been brought by and in the name of the Attorney-General. The Plaintiffs then amended by making the Attorney-General a Defendant, and the corporation then demurred generally to the statement of claim, on the ground that the Plaintiffs had not thereby made such a case as entitled them to any relief, accounts, or discovery from or against the Defendant corporation, as to the matters contained in the said statement of claim, or any of such matters, and on other grounds sufficient, &c.

Hastings, Q.C., *Smart*, and *T. Eustace Smith*, for the Defendant corporation on behalf of the demurrer:—

Where there is an allegation that property is vested in a corporation upon trust for others, the general allegation is not sufficient, but the title of the *cestuis que trust* must be shewn. The reservation of benefits to freemen and their families comprised in the 2nd section of the *Municipal Corporations Act* of 1835 (5 & 6 Will. 4, c. 76) is "for such time and in such manner as he or she by any statute, charter, bye-law, or custom in force at the time of passing this Act might or could have had acquired or enjoyed in case this Act had not been passed:" and the Plaintiffs were bound to shew a title in the freemen under one of these

V.-C. H. 1882

PRESTNEY v. MAYOR AND CORPORATION OF COLCHESTER AND THE ATTORNEY-GENERAL.

four specific heads of origin: *Evan* v. *Corporation of Avon* (1). And this they have not done. But even if the Plaintiffs have a title, it is one which the Attorney-General alone can enforce; because it would be a general public trust, which is the same thing as a charity. This is in fact an action to administer a perpetual trust for a body of persons holding a public office. It is the source from which the funds are derived which is to be regarded; and these properties being the gift of the Crown, a charity has been constituted: *Attorney-General* v. *Heelis* (2). And where relief is sought in respect of a charity it is not enough to make the Attorney-General a party as defendant, the proceeding must be by way of information, so that the Attorney-General may have the opportunity of seeing that there are relators who are competent to pay the costs: *Attorney-General* v. *Aspinall* (3). Moreover, the consent of the Charity Commissioners is necessary, and has not been obtained: *Charitable Trusts Act* (16 & 17 Vict. c. 137), ss. 17, 62.

W. Pearson, Q.C., *H. J. Hood*, and *Challis*, for the Plaintiffs:—

A trust for individual citizens is not a trust for public purposes. The 2nd section of 5 & 6 Will. 4, c. 76, recognises that a trust for the freemen is something distinct from a public purpose, and its effect is to continue to certain individuals all corporate benefits which they by any means whatever enjoyed before the passing of the Act. It is immaterial what was the origin of the right, that right was preserved by the Act. We accordingly are within the saving clause in sect. 2 of the *Municipal Corporations Act*: *Hopkins* v. *Mayor of Swansea* (4). In that case the right arose on a by-law; but this does not affect the principle. The intent and effect of a grant to a corporation is always to be interpreted by the custom of the corporation: *Rex* v. *Davie* (5). And we aver in effect that either by custom or by the charters the rents, tolls, &c., have been applied for this particular purpose. In *Hopkins* v. *Mayor of Swansea* the Court of Queen's Bench held that a custom to apply rents and profits in payment of poor rates

(1) 29 Beav. 144.
(2) 2 S. & S. 67.
(3) 2 My. & Cr. 613.
(4) 4 M. & W. 621; affirmed on appeal, 8 M. & W. 901.
(5) 6 A. & E. 374.

was good; though such a custom could not possibly have arisen before the reign of *Elizabeth*.

[HALL, V.C.:—You have not expressly averred in your pleadings that there was any custom.]

It was not necessary; it is enough if we have in fact enjoyed the benefits, say for twenty years. Under the Judicature Acts conclusions of law are gathered from statements of facts, and the pleader rightly confined himself to stating the facts without saying whether he claimed by statute, charter, by-law, or custom, so that at the trial he could prove either. Moreover, this demurrer is to the whole statement of claim, not to a part only; therefore if we are entitled to any part whatever of the relief sought, the demurrer must be overruled. This demurrer is also too general, not alleging any specific ground, as is required by Order XXVIII., rule 2.

Again, the Defendants say that the Attorney-General alone can sue. Now the whole question is whether we are privately entitled (as we say we are) or are publicly entitled; and the Attorney-General is a party to look after public interests. The argument that the Attorney-General alone can sue amounts to saying that the freemen never can sue at all—a contention which cannot be supported: *Skinners Company* v. *Irish Society* (1). In *Evan* v. *Corporation of Avon* (2), the Plaintiff sued by himself without the Attorney-General and not even on behalf of the rest of the inhabitants, yet the bill was not dismissed upon those grounds, but because the corporation was absolutely entitled. The case of *Attorney-General* v. *Heelis* (3) does not apply. They also referred to *Dolan* v. *Macdermot* (4).

Hastings, in reply:—

Rex v. *Davie* (5) only shews that a custom may be given in evidence to assist in interpreting an ambiguous grant, and not that the effect of an unambiguous grant may be reversed by shewing a contradictory custom.

He also referred to *Chilton* v. *Corporation of London* (6).

(1) 7 Beav. 593; 12 Cl. & F. 425.
(2) 29 Beav. 144.
(3) 2 S. & S. 67.
(4) Law Rep. 5 Eq. 60; S. C. on app. 3 Ch. 676.
(5) 6 A. & E. 374.
(6) 7 Ch. D. 735.

V.-C. H. 1882 PRESTNEY v. MAYOR AND CORPORATION OF COLCHESTER AND THE ATTORNEY-GENERAL.

HALL, V.C.:—

I have had an opportunity of considering this pleading, and, contrary to my first impression, I think that there is enough upon the statement of claim to entitle the Plaintiffs to proceed, and not to be cut short by means of this demurrer. Although there was perhaps enough in the statement of claim to embarrass the corporation as to what really was the foundation of the Plaintiff's case, and although the statement of claim does not expressly mention the 2nd section of the *Municipal Corporations Act* (and no doubt it was not necessary, and perhaps it would not have been proper so to do), yet, having been brought under discussion, as I read the matter now, it comes to this, that these three properties were each of them the property of the corporation. There was, so far as appears, no trust of either property for the freemen under any charter distinct from such interest as the freemen might have as members of the corporation, and as distinct from the corporation itself. The free grant was to the corporation, and the property belonged to them to be dealt with by them as their corporate property; and, irrespective of the *Municipal Corporations Act*, it was at their absolute disposal, like the property of all municipal corporations. It was not affected expressly by any separate or distinct trust. That is the effect of it as regards each one of the three properties, and so I read the statement of claim and the position of the Plaintiffs and the corporation in reference to each property; but in each instance these facts are accompanied by the statements contained in the three paragraphs of the statement of claim which separately follow the completion of the narrative as to each separate property. Taking the first property, the statement begins with the 15th paragraph of the statement of claim. There is there a statement that it was vested upon trust for the free burgesses or freemen of the borough of *Colchester*. If you stop there I do not know what might be said to that; but when we get to the 16th paragraph it expressly covers the provisions, as it seems to me, of the 2nd section of the *Municipal Corporations Act*. The 16th paragraph says, that though it is the property of the corporation, and though the corporation hold it for the free burgesses or freemen of the borough (whatever that may mean), yet, referring to the *Municipal Corporations Act*,

it says expressly that the property was not at that time applicable for public purposes, but then was and always had been held and applied for the particular benefit of the free burgesses or freemen of the borough. These words seem to me to follow the provisions of the 2nd section, which begins by stating that "In divers cities, towns, and boroughs the common lands and public stock" . . . "and the rents and profits thereof," which we have to deal with, "have been held and applied for the particular benefit of the citizens, freemen, and burgesses" of those boroughs, "and have not been applied to public purposes; Be it therefore enacted, that every person who . . . has been admitted a freeman or burgess," and there are certain other cases, "shall have and enjoy, and be entitled to acquire and enjoy, the same share and benefit of the lands, tenements, and hereditaments, and of the rents and profits thereof, and of the common lands and public stock, . . . and of any lands, tenements, and hereditaments," and so forth, "as fully and effectually, and for such time and in such manner as he or she by any statute, charter, bye-law, or custom in force at the time of passing this Act, might or could have had acquired or enjoyed in case this Act had not been passed." Then there are certain provisoes, which I do not think affect the matter stated. It comes to this then, as it seems to me, that there is an averment which we can now understand as amounting to this: that the particular property there specified, though taking it (as I do take it) to be the property of the corporation, is a property which has not been applied for public purposes, but has been held and applied for the particular benefit of the freemen. If that is so, the case is expressly brought within the scope and operation of sect. 2, and as the title to the relief is founded upon that statement, it seems to me that, unless the other objections succeed, I must treat this property as applicable for the benefit of the freemen, and hold that the freemen are, in some way or another, entitled to have their rights considered, and to be protected according to that section. The same observation fully applies, as it seems to me, to the other two properties, accompanied as they are by a clause corresponding to the 16th paragraph, which refers to the first property.

That brings me to consider the other objections. Now as

V.-C. H. 1882 PRESTNEY v. MAYOR AND CORPORATION OF COLCHESTER AND THE ATTORNEY-GENERAL.

regards the objection that this property ought to be sued for as being property in the nature of charity, or of such a nature as that the Attorney-General is the only person who ought to be allowed to sue in respect of it, it seems to me that, whatever be its true description and character as regards charity or public property, I must first of all deal with it as a property pointed at and described by the 2nd section. As to the question whether the Attorney-General only ought to be allowed to sue, that is not without difficulty and somewhat embarrassing. If these freemen have the right, it would be a right which, if the Attorney-General alone can sue in respect of it, is fettered to some extent by the necessity of getting his consent. These parties say they have the right; that it is their property; that they ask the Defendants to account for it, and that they refuse; and, as in other cases of a numerous body of persons having the same right, the Plaintiffs say that one can sue on behalf of himself and others. That is all consistent with the ordinary and regular course of proceeding in the Courts. It is only the corporation, apparently, who have anything to fear in respect of this; and they say, "Go to the Attorney-General and see if he will institute this proceeding." Perhaps he may not; perhaps he may require security. I do not think that these considerations have much to do with the matter upon principle. But it has however frequently come under discussion in what cases parties might sue without going to the Attorney-General, and I find that Lord *Eldon*, in the case of *Davis* v. *Jenkins* (1), says this: "The question, what is that species of suit, that must be maintained by information, and cannot proceed upon a bill, is a point of great difficulty. It is not true, as has been contended, that when the subject is a public right, the suit must be by information;" and his Lordship in that case directed some particular inquiry or inquiries, and upon consideration he found a mode of dealing with it at once. He directed proceedings, or rather, he let the matter go on; and the proceeding was not stopped on the ground that it was not on information by the Attorney-General. I do not myself see that this is a case which ought to be sent to the Attorney-General, or not to be entertained without the Attorney-General's permission.

(1) 3 V. & B. 151, 154.

I do not think that in this case I ought to say that proceedings can only be taken by the Attorney-General. I cannot see why these parties should not sue, like any other persons having common rights and being a body of persons, or why they should not have their rights, which for this purpose must be taken to be as they are alleged, protected without going to the Attorney-General. I cannot say that this is in the nature of a charity, and that the Plaintiffs must therefore go to the Attorney-General. I cannot say that, from the nature of the interests of these parties, they take only as charitable objects. What I do say is this: this right is under the Act of Parliament; it is not a right by reason of their being a charity, but because the *Municipal Corporations Act* has established that right, and has said they are to have that right; nor do I wish to save the rights of these parties from any illegality in reference to perpetuity, or otherwise, by sheltering them under this being a charity. I consider the statute ought to be read as applying to all property vested in a municipal corporation, subject only to this, that the Legislature, in passing the *Municipal Corporations Act*, had found that certain property of corporations had been applied in a particular way, and that, as I read the Act and think it ought to be read, this state of things is to go on without reference to any question as to whether it would be legal or illegal if it had been created by some private donation or grant. That is not the test. The test is one of fact. The property has been applied in the way specified; and the Legislature says that it shall continue so to be applied. And I do not think that by reason of the words, "as fully and effectually, and for such time and in such manner as he or she, by any statute, charter, bye-law, or custom in force at the time of passing this Act, might or could have had, acquired or enjoyed, in case this Act had not been passed," I should hold upon this demurrer that this cannot go on at all because it is in itself illegal on the ground of perpetuity;—that if it be not a charity, it would be illegal, and therefore those words limit the operation of the section. I am satisfied that this section was intended to treat the interests which the freemen had got in that way as effectual and binding, whether they had got them legally or illegally, so far as regards any such consideration as that it would be a perpetuity and there-

V.-C. H.
1882
PRESTNEY
v.
MAYOR AND CORPORATION OF COLCHESTER AND THE ATTORNEY-GENERAL.

fore could not be effectually given in that way. I cannot, upon any ground that I can see, consider that this is a case in which it is necessary to say that the parties, if they are to have their rights protected upon any ground, can only sue by information, that is, in the name of the Attorney-General.

Therefore that ground seems to me to fail; and with reference to the other ground, that this is a charity, and that therefore the Plaintiffs must have the consent of the Charity Commissioners, I do not hold this to be a charity for that purpose. For the purpose of the *Municipal Corporations Act* there is an interest recognised as being vested in these parties, and they are entitled upon that ground, and they are not, under these circumstances, to be deemed to be taking it only as a charitable disposition in their favour. The words are "statute, charter, bye-law, or custom;" and though it is not said that it was by custom that they were entitled, I think it is sufficiently averred that such was the customary mode of applying the property. I do not consider the word "custom" in the Act to be used in the technical sense, but as meaning that such was the usage; the word is only equivalent to "usage"; and means, not that you are obliged in such a case as this to allege and prove a custom, but that you are only to allege what may be taken to be the usage and the ordinary mode of applying the property. And I think this view is somewhat fortified by the circumstance that Baron *Parke* (1) seems to consider the word "custom" an equivalent to "or otherwise"—*i.e.*, that in some other way, or from some other cause, the property has in fact been so applied, and that therefore such application is to go on.

I think therefore that all these grounds of objection fail, and that the action must proceed. The technical objections seem to me to have no substance whatever, and I shall not allow any of them. I think this action cannot be stopped by the demurrer and must proceed.

Demurrer overruled, with costs.

Solicitor for Plaintiffs: *C. Harris.*
Solicitors for Corporation: *Philbrick & Corpe.*

(1) 4 M. & W. 644.

W. W. K.

Explained. Re HARARI'S SETTLEMENT TRUSTS. [1949] 1 All E.R. 430.

In re BRAITHWAITE. BRAITHWAITE *v.* WALLIS.

[1881 B. 3284.]

V.-C. H. 1882 *May* 3.

Will—Legacy for Life—Residuary Legatee—Administration by the Court.

The rule that if personal property consisting of money or stock is limited to *A.* for life, and after his death to *B.* absolutely, it will be ordered into Court for administration in an action by *B.* for the purpose, is not absolute, and will only be enforced as against *A.* where there is reasonable ground, such as danger to the fund, for the application.

ISAAC BRAITHWAITE, deceased, by his will dated in 1880, gave to the Defendant Mrs. *Carington* "The sum of £5000 free of duty for her sole and separate use, and to be invested by trustees to be nominated by her, so that she shall have the income for her life without power of anticipation; and after her death the principal sum to fall into my residuary estate," and the testator gave his residuary estate to his father the Plaintiff. The testator gave to Mrs. *Carington* the power of nominating trustees, and authorized them to invest on such securities as they might think fit.

All the testator's debts had been paid, and the sum of £5000 set apart to answer Mrs. *Carington's* legacy; and this action was brought by the Plaintiff as residuary legatee against the executor and Mrs. *Carington* in order to have the trusts of the will so far as related to the legacy of £5000 carried into execution by the Court, to have the legacy brought into Court and duly invested, and to have the estate of the testator if and so far as necessary administered by the Court.

Mrs. *Carington* put in a statement of defence, whereby she stated that she had appointed trustees in accordance with the will of the testator, and claimed that the legacy might be paid to such trustees.

W. Barber, Q.C., and *Ingle Joyce*, for the Plaintiff:—

There is nothing in the will as to the manner in which this

V.-C. H. 1882 *In re* BRAITHWAITE. BRAITHWAITE v. WALLIS.

£5000 is to be invested, and we desire to have it properly invested and to keep sight of the fund. The Plaintiff, as residuary legatee and absolutely entitled to the fund, subject only to the life interest of Mrs. *Carington*, has as a matter of course, and whether the fund is in danger or not, the right to have it brought into Court and secured at his own expense: *Haddan* on Administration (1); *Phipps* v. *Annesley* (2); *Ferrand* v. *Prentice* (3); *Freeman* v. *Fairlie* (4).

Hastings, Q.C., and *Cust*, for Mrs. *Carington*:—

There is no such absolute rule as is contended for, and there is no reasonable ground for this action.

Oswald, for the executor.

HALL, V.C.:—

I do not think that the rule is as absolute as the counsel for the Plaintiff have contended, although the fund would, no doubt, be brought into Court in any case where there was reasonable ground for the application. But there is here no pretence for the Court taking the fund into its own hands and administering it. The testator did not think fit himself to appoint trustees, but considered it more satisfactory to leave the legatee for life herself to appoint her own trustees, who were to select their own investments, which must however, of course, be such as the law permits. And so long as the investments are such as cannot be quarrelled with, that state of things may be left to continue. The residuary legatee may of course from time to time make inquiry as to how the fund is invested. And if proper trustees are not kept up, from the death of one and a neglect to fill up the vacancy, or if for any other cause the fund is in jeopardy, and ought to be taken care of by the Court, an application can be made for the purpose. But the leaning of the Court has lately been rather to get rid of a fund where there are proper trustees to take care of it. Certainly in this case the proper course is, according to the terms of the will, to pay over this

(1) Pages 229, 230.
(2) 2 Atk. 57.
(3) Ambl. 273.
(4) 3 Mer. 29.

£5000 to the trustees appointed by the legatee, and there must be an order for the purpose. It must be invested by them in their names in some or one of the investments upon which trustees can, by law, properly invest trust funds, and they must give notice of every change of investment. A proper declaration of trust must be executed, and the Defendants are entitled to their costs of the action as well as to those of the declaration of trust. There will be liberty to apply.

Solicitors: *Sewell & Edwards; Bowker, Peake, Bird, & Collins.*

W. W. K.

In re HARVEY'S SETTLED ESTATE.

Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18), *s.* 16—*Sale out of Court.*

The Court has no jurisdiction to direct a sale under the *Settled Estates Act*, 1877, to be conducted out of Court.

In re Adams' Settled Estates (1) not followed.

THIS was a petition for the sale of a settled estate, praying that subject to a reserve price (which had been fixed by a surveyor) the trustees of the will by which the estate was settled might be authorized to sell the property out of Court by public auction or private contract, and might be at liberty out of the proceeds to pay the costs and expenses of the application, and subject thereto that such proceeds might be paid into Court with liberty to apply in Chambers as to the application thereof. All the parties beneficially interested (some of whom were infants) were co-Petitioners, and the trustees were Respondents. There was evidence to shew that an immediate sale would be beneficial, and it appeared that a sale out of Court was desired in order to avoid the delay which would take place in settling the particulars and conditions, and advising on the title by the conveyancing counsel to the Court.

Kekewich, Q.C., and *Medd*, in support of the petition, cited

(1) 9 Ch. D. 116.

V.-C. H. 1882 *In re* HARVEY'S SETTLED ESTATE.

In re Andrews' Settled Estates (1), and *In re Adams' Settled Estates* (2).

Tweedy, for the Respondents.

HALL, V.C.:—

I have already in *Re Simpson's Settled Estates* (3) declined to follow *In re Adams' Settled Estates*. The 16th section of the *Settled Estates Act*, 1877, provides that every sale "shall be conducted and confirmed" in the same manner as sales of land sold under a decree of the Court, and the conclusion to which I came in the case I have referred to was that a sale out of Court was not within the terms of the statute. The Court must retain some control over the sale. The order will accordingly be in the usual form, but every facility will be afforded to you in Chambers.

Solicitors: *Childs & Batten.*

W. W. K.

V.-C. H. 1882 *May* 19, 20

CLARKE *v.* PALMER.

[1879 P. 164.]

Mortgagor and Mortgagee—Successive Mortgages—Possession of Title Deeds—Negligence of First Mortgagee—Priority.

P. mortgaged estates to *M.*, and was allowed to retain possession of the title deeds. He subsequently mortgaged one of the estates to *A. B.*, who obtained possession of the deeds, and all the estates to *C.*, who advanced his moneys after ascertaining the position of the deeds, and upon the faith that *A. B.* was the only prior mortgagee:—

Held, that *M.*, by not obtaining possession of the deeds, enabled *P.* to deal with his estates as an unencumbered owner; that *A. B.* having been diligent in obtaining the deeds acquired priority, and that *C.* also having been diligent in ascertaining that *A. B.* had the deeds, apparently as first mortgagee, the same principle extended to him, and he also had priority over *M.*

The case of *Perry-Herrick* v. *Attwood* (4) explained and followed.

THE Rev. *Richard F. Palmer* died on the 8th of May, 1879. An action was shortly afterwards commenced by the widow of

(1) 26 W. R. 811.
(2) 9 Ch. D. 116.
(3) Unreported, Feb. 1879.
(4) 25 Beav. 205; 2 De G. & J. 21.

E. P. Clarke and by *W. R. Clarke* (since deceased), both creditors, for the administration of the testator's estate. The personal estate was insufficient for the payment of the testator's debts. The real estate was sold by order of the Court and the proceeds were paid into Court. After payment thereout of a mortgage debt, the priority of which was not contested, there remained a balance, which was now claimed by various mortgagees. The principal question was who were entitled to priority of charge on the fund.

The certificate of the Chief Clerk set forth the real estate in the 1st Schedule in parts 1, 2, and 3, describing the properties and apportioning their values, the whole having been sold to one purchaser.

Part 1 consisted of a messuage, buildings, and lands, comprising in the whole 261*a.* 1*r.* 27*p.*

Part 2 consisted of buildings and lands, comprising in the whole 105*a.* 3*r.* 8*p.*; and

Part 3 consisted of lands only, *i.e.*, 3*a.* 2*r.* 31*p.*

The Rev. *R. F. Palmer* succeeded to the whole of the estates as heir-at-law of his father, who died in April, 1852. At that time part 2 was subject to an equitable mortgage, dated the 24th of May, 1849, to secure to *Wigge & Stoughton* the sum of £1000, and the title deeds were in their possession.

The Chief Clerk had in the 2nd Schedule set forth the particulars of the incumbrances. It appeared that all the estate comprised in part 1 was, by an indenture dated the 8th of February, 1862, mortgaged to *J. B. Herring* and *W. T. Collison* to secure the sum of £7000. As to their priority there was no contest. They held the title deeds of this part of the estate.

Next, that all the estates comprised in parts 1, 2, and 3 were by an indenture, dated the 25th of August, 1862, mortgaged to Sir *J. R. Milbanke* to secure the sum of £1000; that all the estate comprised in part 2 was by an indenture, dated the 14th of August, 1863, mortgaged to the Rev. *J. Preston* to secure the sum of £2000; that all the estates parts 1, 2, and 3 were by an indenture, dated the 23rd of December, 1868, mortgaged to *E. P. Clarke* to secure the sum of £1000; and that all the same estates were by an indenture, dated the 25th of July, 1877,

V.-C. H. 1882

CLARKE v. PALMER.

mortgaged to the executors of the Rev. *W. Frost* to secure the sum of £1500.

The evidence shewed that no inquiry by or on behalf of Sir *J. R. Milbanke* was made either of *Wigge* and *Stoughton* or of their solicitors, or of *Herring* and *Collison* or of their solicitors, as to the title deeds in the possession of *Wigge* and *Stoughton* and *Herring* and *Collison*, or of the solicitors of the Rev. *R. F. Palmer*, as to the title deeds of the property mortgaged; and it further appeared that in the mortgage to Sir *J. R. Milbanke* there was an inaccurate description of the property in some important particulars, and that no inquiry was made for the purpose of verifying the description of the property. He having given no notice of any charge upon the estates, the Plaintiff—the widow of *E. P. Clarke*—claimed to be entitled under the indenture of December, 1868, to a charge in priority to Sir *J. R. Milbanke* on parts 2 and 3, because he allowed the title deeds of these estates to remain in the hands of the mortgagor; in consequence thereof the Plaintiff's husband and other persons subsequently advanced moneys to the mortgagor upon the security of the estates.

When the indenture of August, 1863, was executed the title deeds of part 2 in the possession of *Wigge* and *Stoughton* were handed by them to the Rev. *J. Preston*, they being paid off their equitable charge.

The Rev. *R. F. Palmer* handed to the Rev. *J. Preston* other title deeds of the property comprised in his mortgage. The Rev. *J. Preston* was not informed of the existence of Sir *J. R. Milbanke's* mortgage, and he advanced his money upon the faith of being first mortgagee of the property.

And when *E. P. Clarke* advanced his money in December, 1868, he was wholly unaware of the existence of the mortgage to Sir *J. R. Milbanke*, and made the advance upon the faith that *Herring* and *Collison* were the first and only mortgagees of part 1; and that the Rev. *J. Preston* was the first and only mortgagee of part 2.

E. P. Clarke and his partner were the Rev. *J. Preston's* solicitors at the time, and the deeds relating to his mortgage were in their possession as such solicitors. There was evidence shewing that on the 21st of May, 1879, the solicitors of the representative of

Sir *J. R. Milbanke* (who died in 1868) wrote to *Thomas C. Frost*, the brother of Mrs. *Palmer*, a letter giving particulars of loans made to her husband on the security of his estates, and this communication was the first notice which the other mortgagees or their solicitors received of any charge having been executed by him in favour of Sir *J. R. Milbanke*.

The Chief Clerk, after certifying that *Herring* and *Collison* were first mortgagees of part 1, and that no one opposed their claim, certified that the Rev. *J. Preston* was first mortgagee of part 2; that Sir *J. R. Milbanke* was second mortgagee of parts 1 and 2, and first mortgagee of part 3; that *E. P. Clarke* was third mortgagee of parts 1 and 2, and second mortgagee of part 3; that the Rev. *W. Frost's*, executors, mortgage was last as to all three parts of the estates; and that Sir *J. R. Milbanke* must be postponed to the Rev. *J. Preston* on the ground that he allowed the title deeds to remain in the hands of the mortgagor, and thereby enabled him to obtain further advances, but he refused to postpone Sir *J. R. Milbanke* in favour of the other incumbrancers.

The Plaintiff took out a summons (adjourned into Court to be heard with the further consideration) asking that the certificate might be varied by giving her priority over Sir *J. R. Milbanke* as to the estates comprised in parts 2 and 3.

Herring and *Collison* and the Rev. *J. Preston's* mortgages had been paid off under an order of the Court made in March, 1882.

As to part 3 the evidence was incomplete, and it was submitted that an affidavit should be made to prove whether there was a separate deed executed of this estate to *E. P. Clarke*.

Hastings, Q.C., and *Langworthy*, for the Plaintiff, submitted that as Sir *J. R. Milbanke* did not make any inquiry as to the title deeds, he was guilty of wilful negligence, and should therefore be postponed to the other mortgagees: *Hewitt* v. *Loosemore* (1). The principle of the decisions in these cases was that if the first mortgagee, by his negligence, left the title deeds with the mortgagor, and thereby allowed him to hold himself out as the owner of an unencumbered estate, he must be postponed; and it was not the mere possession of the title deeds by the second mortgagee

(1) 9 Hare, 449.

V.-C. H. 1882 CLARKE v. PALMER.

(*Preston*) which would give Sir *J. R. Milbanke* priority over *E. P. Clarke* and others: on the contrary, his negligence would deprive him of priority, and it would enure not only for the benefit of *Clarke*, but of every subsequent incumbrancer who advanced moneys upon the faith that the mortgagee (*Preston*), who held the deeds was the first in title. This was the principle of the decision in *Perry-Herrick* v. *Attwood* (1). There the first mortgagees who had allowed the title deeds to remain in the custody of the mortgagor, were postponed to the second and third incumbrancers.

The case of *Briggs* v. *Jones* (2) was also an authority on the point. *E. P. Clarke* was not guilty of any negligence, but innocently advanced his moneys to the mortgagor, therefore he should be allowed to take precedence of the incumbrancer who was, in fact, the author of all the mischief.

[They also referred to *Rice* v. *Rice* (3); *Worthington* v. *Morgan* (4), and *Layard* v. *Maud* (5).]

Northmore Lawrence, for the representative of Sir *J. R. Milbanke*, submitted that as regarded the equitable mortgage of part 2 to *Wigge* and *Stoughton*, the evidence did not shew that Sir *J. R. Milbanke* was guilty of negligence, and therefore he should not be postponed as to that part. Both Sir *J. R. Milbanke* and his solicitor were dead, or they might have been able to shew that there was no negligence on the part of either. The Reverend *J. Preston's* priority had not been seriously contested, because he had obtained possession of the title deeds, but that fact did not give *Clarke* any claim to priority. The cases of *Perry-Herrick* v. *Attwood* and *Briggs* v. *Jones* were no authorities for the Plaintiff in this case, as there the prior mortgagees allowed the deeds to remain with the mortgagors, so that they might borrow other moneys. The decisions shewed that it was the possession of the deeds which gave priority. It was not necessary that Sir *J. R. Milbanke* should make any inquiry for the deeds, or give notice of his mortgage to the first mortgagees. The summons ought to be dismissed.

(1) 25 Beav. 205; 2 De G. & J. 21.
(2) Law Rep. 10 Eq. 92.
(3) 2 Drew. 73.
(4) 16 Sim. 547.
(5) Law Rep. 4 Eq. 397.

(1) 3 Jur. N. S. 995. Cab. 101.

[He also referred to *Waldron* v. *Sloper* (1) and *Stackhouse* v. *The Countess of Jersey* (2).]

Eddis, Q.C., and *Langley*, for another Defendant, referred to *Thorpe* v. *Holdsworth* (3).

Hastings, in reply, said that the plaintiff did not seek to have priority over Sir *J. R. Milbanke* so far as part 1 was concerned, but as to parts 2 and 3 the summons should be varied. The Reverend *J. Preston's* right to priority was really admitted by Sir *J. R. Milbanke's* solicitors, as they agreed in Chambers that he should be paid off out of the fund in Court.

HALL, V.C.:—

I cannot dispose of this case without giving consideration to the decision in *Perry-Herrick* v. *Attwood* (4). I think the principle there laid down is that it is not merely the incumbrancer who gets possession of the deeds who obtains the better equity. That is the first point to consider. That is really an equity which the possessor of the deeds obtains as against the legal owner, and he individually by obtaining the deeds gets a better equity to postpone the legal owner, but I cannot dispose of the case upon that ground merely, without considering whether the postponement does not operate for the benefit of anybody else who, in fact, came in innocently, and in the belief that there was not in existence the first mortgage in point of date. Both parties believed that they were obtaining the deeds—the one from whom inquiry, in fact, was made, and the other who in reference to his security made the inquiry—he is now equally entitled to the benefit of the negligence on the part of the legal owner who did not obtain possession of the deeds: *i.e.*, the subsequent incumbrancer having made inquiry into the matter, and having acted in the belief that the mortgagee who had got the first benefit of postponement by having obtained the deeds—he and anybody else who *bonâ fide* advanced his money founded on the like belief, and arising out of the transaction in regard to the deeds, and connected with it, is entitled to the same benefit on the like principle of equity. It

(1) 1 Drew. 193.
(2) 1 J. & H. 721.
(3) Law Rep. 7 Eq. 139.
(4) 25 Beav. 205; 2 De G. & J. 21.

V.-C. H. 1882 CLARKE v. PALMER.

seems to me that the decision in *Perry-Herrick* v. *Attwood* (1) is not explainable with reference to the subsequent incumbrancer in that case, except upon that principle. I think, therefore, that upon the evidence the deeds were left, and improperly left, by Sir *J. R. Milbanke* in the possession of the mortgagor, and that they came into the possession of the second mortgagee (*Preston*). I hold that the negligence, under the circumstances appearing in the evidence, enures for the benefit of Mr. *Clarke*. It is not, however, a matter of course, that because the first mortgagee is postponed to the second mortgagee, the benefit enures to the third, fourth, and fifth mortgagees, but the evidence must be considered with reference to them, and the Court must see whether they can be looked upon as having been misled. As to part 3, if an affidavit be made that there was a separate deed or deeds, the same result will follow in favour of the Plaintiff. Subject to the production of the affidavit, the summons will be allowed as asked, but if not, then as to the estate part 2, the Plaintiff will be second in priority instead of third. As to part 3, that will depend upon the affidavit.

The costs will be costs in the action.

Solicitors: *Whites, Renard & Co.*, agents for *Whites, Renard, & Pomeroy, Wymondham, Norfolk*, and agents for *Grigson & Robinson, Watton, Norfolk; Surman, Henley, & Co.*

(1) 25 Beav. 205; 2 De G. & J. 21.

T. F. M.

In re BUTLER'S WHARF COMPANY.
ANDERSON *v.* BUTLER'S WHARF COMPANY.

V.-C. H.
1882
May 25.

[1879 A. 115.]

Summons heard in Chambers—Desire to appeal—Practice—Motion for Certificate of Judge.

Where, on a summons heard in Chambers, an order has been made by the Judge and not adjourned into Court, and there is a desire to appeal against it, the proper course is not to move in Court, on notice, to discharge the order, or for a certificate that the Judge does not desire it to be reheard, but to make an application in Chambers.

Holloway v. *Cheston* (1) not followed.

THE *Butler's Wharf Company* being in course of winding-up the liquidator took out a summons for leave to bring an action against Mr. *Lafone* to recover the money owing for certain goods purchased by him from the company. Mr. *Lafone* also took out a summons in the matter and action, alleging that a sum of money was due to him from the liquidator in excess of the purchase-money, claiming a set-off, and asking that the liquidator might be directed to pay to him the balance.

On the liquidator's summons the Chief Clerk made no order, but on Mr. *Lafone's* summons he made an order in his favour. Both summonses were brought before the Vice-Chancellor in Chambers on the 1st of May, 1882, and he made an order affirming what had been done by the Chief Clerk.

No application was at that time made to adjourn the summonses into Court for rehearing, but the liquidator now desired to appeal against the order which had been made in Chambers.

Fellows, for the liquidator, moved, on notice served upon Mr. *Lafone*, for a certificate from the Vice-Chancellor that he did not desire to have the summonses reheard, or, in the alternative, that the order made in Chambers might be discharged. He referred to the case of *Holloway* v. *Cheston* (1), where Mr. Justice *Chitty* said that he intended to follow the practice of the Master of the

(1) 19 Ch. D. 516.

V.-C. H. 1882 *In re* Butler's Wharf Company. Anderson *v.* Butler's Wharf Company.

Rolls, and adjourn summonses into Court for argument or judgment where an appeal was desired, and that where there was no adjournment, the proper course was to move to set aside the order made in Chambers, so that the Judge might have the opportunity of delivering a judgment which would enable the Court of Appeal to understand the reasons for his decision.

C. Browne, for Mr. *Lafone*, submitted that if the liquidator had applied to the Judge in Chambers to adjourn the summonses into Court there would have been no objection raised. This motion was unnecessary, and should be refused.

Hall, V.C.:—

I have never adopted the practice referred to. I think that it is a very inconvenient course to take in a case in which a party, when before the Judge in Chambers, is desirous of appealing from his decision. If such a desire be, at the time of making the order, expressed, the Judge could at once provide, according to the old practice, against there being any necessity for mentioning the matter in Court, as making such an application as this only creates costs. There may be cases in which, from the nature of the questions involved, the Judge would think it proper that there should be the process of a rehearing, in order to give him the opportunity of reconsidering the question and stating the grounds of his decision. In many cases that might be useful, as the reasons would be by that means communicated to the Court of Appeal. But to make it necessary that there should be a motion of this kind in every case which is being taken to the Court of Appeal, seems to me a practice not desirable to adopt. I have not the least recollection of the question raised upon these summonses, nor do I know whether I should desire it to be again discussed or not. It may be that I should have said to the applicant, "If you wish to take the opinion of the Court of Appeal I should desire that the question should be further gone into." Cases constantly come on in Chambers in which, according to discretion, orders are made without that deliberation which might be taken by the Judge if he were told that they would be taken to the Court of Appeal. I shall not make an order upon this

motion, except that the matter must be brought before me again in Chambers.

C. Browne asked that the liquidator might be ordered to pay Mr. *Lafone's* costs of the motion, which had been held to be unnecessary. This motion was an indulgence for which the liquidator should pay.

HALL, V.C.:—I will not order the liquidator to pay these costs; the case which has been referred to being a ground for making the motion.

Solicitors: *Stibbard, Gibson, & Co.; West, King, Adams, & Co.*

T. F. M.

FRY, J.
1882
March 9, 13.

CLARKE *v.* SKIPPER.

[1882 C. 83.]

Trial—Jury—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26.

8PD206

The hearing of a motion for an injunction was (with the consent of the Defendants), ordered to stand to the hearing, with liberty to either party to apply to expedite the trial:—

Held, that the Defendants by consenting to such order were not deprived of their option to have the issues of fact tried by a jury, although the effect might be to prevent the Plaintiffs from having the trial expedited.

THIS was a motion by the Defendants that the issues of fact in the action might be tried before a Judge and jury, pursuant to a notice in that behalf given by the Defendants on the 6th of March.

The writ was issued on the 7th of January, 1882, and was indorsed with a claim for an injunction to restrain the Defendants from working certain machinery in such a manner as to cause a nuisance or injury to the Plaintiffs, and for damages. On the same day the Plaintiffs gave notice of motion for an injunction in the terms of their claim. The motion came on to be heard on the 2nd of February. The Plaintiffs' counsel then proposed that the motion should stand over to the trial of the action, with liberty for either party to apply to the Court to expedite the trial. The Defendants' counsel assented to this, and Mr. Justice *Fry* made an order accordingly. On the 7th of February the Plaintiffs delivered a statement of claim, and on the 1st of March the Defendants delivered their statement of defence.

The Plaintiffs delivered their reply on the 2nd of March, and on the same day they gave notice of trial.

On the 6th of March, the Defendants gave notice to the Plaintiffs that they desired to have the issues of fact tried before a Judge and jury. On the 9th of March, the Plaintiffs moved that, notwithstanding the Defendants' notice of the 6th of March, the issues of fact in the action might be tried by a Judge without a jury at the same time with the trial of the action. Mr. Justice *Fry* then ordered that the trial should be before himself on the

27th of March. The motion of the Defendants came on to be heard on the 13th of March.

Glasse, Q.C., *Cookson*, Q.C., and *Warmington*, for the Plaintiffs:—

The Defendants are not entitled to a jury, because when the motion for an injunction came on on the 2nd of February, they consented that the motion should stand to the hearing with liberty for the Plaintiffs or Defendants to apply to expedite the hearing. This right of applying to expedite the hearing will be lost by the Plaintiffs if the action is transferred for the purpose of having it tried by a jury.

J. Pearson, Q.C., *Aston*, Q.C., and *Maidlow*, for the Defendants:—

We are entitled to have this action tried by a jury: *Leech* v. *Schweder* (1); *Bordier* v. *Burrell* (2); *West* v. *White* (3); *Clarke* v. *Cookson* (4); *Sugg* v. *Silber* (5); *Salvin* v. *North Brancepeth Coal Company* (6); *Clements* v. *Norris* (7); *Wedderburn* v. *Pickering* (8).

Glasse, in reply:—

The action is one which would formerly, have been tried in the Court of Chancery. Rule 26 of Order XXXVI. therefore applies, and the Defendants have no absolute statutory right to a jury, but the Court has a discretion: *Swindell* v. *Birmingham Syndicate* (9); *Back* v. *Hay* (10); *Wood* v. *Hamblet* (11); *Brooke* v. *Wigg* (12); *Fuller* v. *Sargeant* (13). A jury may disagree and cause expense. There will be first a trial before the jury and then a hearing by the Court upon the findings of the jury.

FRY, J.:—

This is an application for the exercise of the discretion of the Court. The 3rd rule of the Order XXXVI. gives the Defendants a

(1) 22 W. R. 292.
(2) 5 Ch. D. 512.
(3) 4 Ch. D. 631.
(4) 2 Ch. D. 746.
(5) 1 Q. B. D. 362.
(6) Law Rep. 9 Ch. 705.
(7) 26 W. R. 94.
(8) 13 Ch. D. 769.
(9) 3 Ch. D. 127.
(10) 5 Ch. D. 235.
(11) 6 Ch. D. 113.
(12) 8 Ch. D. 510.
(13) Weekly Notes (1882), p. 4.

FRY, J.
1882
CLARKE
v.
SKIPPER.

right to have an issue of fact tried by jury, subject to the discretion given to the Court by the 26th rule of the same Order. That discretion applies to cases in which, without the consent of the parties, the matter could before the passing of the *Judicature Act* have been tried without a jury. This is such a case, and there is therefore no doubt that the discretion given to the Court by the 26th rule comes into operation.

The real question is, in what manner ought I to exercise that discretion. It appears to me plain, from the structure of the rules, that, where a defendant gives a notice under rule 3 that he desires a trial by jury, he has a *primâ facie* right to have the case tried with a jury, that is to say, the burthen of shewing that the discretion of the Court ought to be exercised in the opposite manner rests on the plaintiff.

Many arguments have been addressed to me to induce me to refuse to direct that this case shall be tried with a jury. In the first place, it has been said that the possibility of a jury disagreeing ought to be taken into consideration. That is a matter which, in my opinion, I ought not to consider, because the rules, as I have already said, give a *primâ facie* right to the Defendant to have his case tried with a jury if he so desire. Then it was urged that delay would be caused by having the case tried with a jury, but that, I think, is an objection which ought not to be considered in determining how the discretion of the Court is to be exercised. The objection would apply in every case in which a defendant desires to have a jury. What is much more material is this, that the Plaintiffs, when their motion for an injunction came on, proposed that it should stand over till the trial of the action, and that was assented to by the Defendants' counsel; and the view which I took at first on a former occasion was that that constituted something in the nature of a bargain between the parties. In that view I now think I was wrong, and for this reason, that it was for the Plaintiffs, upon their motion standing over to the trial, to ask that they might have leave to expedite the trial, and it was for the Court to grant or to refuse that application, and, though the assent of the Defendants facilitated the granting of the application, it was not a material element in inducing the Plaintiffs to shape their course.

Then, again, it is said that the Plaintiffs will not be able to have the action tried so early with a jury as they otherwise would. That is probable. But if I were on that ground to deprive the Defendants of their right to a jury it would come to this, that in every case in which a plaintiff desired that his motion for an injunction should stand till the trial, with liberty to apply to expedite the trial, it would be of no use for the defendant to say, I insist on my right to have the case tried with a jury. The rule gives the defendant time to determine whether he desires to have a jury, and, in my judgment the plaintiff cannot, by applying to expedite the trial, shorten this period. Whether there is a jury or not, the plaintiff cannot expedite the trial in a case in which the defendant is not prepared to determine what course he may take on the motion. I have no doubt that the Plaintiffs allowed their motion to stand over in the expectation that I should expedite the trial, as I was quite willing to do. That, again, was a matter for the Plaintiffs' consideration, but they cannot in that way deprive the Defendants of their statutory right to a jury.

I have come to the conclusion that the Plaintiffs have not shewn any sufficient ground for having the case tried by myself alone. Therefore I shall direct that the issues of fact be tried by a Judge and jury. At the same time I shall give the Plaintiffs leave to bring on their motion for an injunction before me, if they think proper to do so.

Solicitors for Plaintiffs: *Wilkins, Blyth, & Dutton.*
Solicitors for Defendants: *Vandercom, Hardy, & Oatway.*

C. W. C.

FRY, J.
1882
April 18.

COMPTON *v.* PRESTON.

[1880 C. 01244.]

Practice—Pleading—Counter-claim—Claim for Recovery of Land—Joinder of other Cause of Action—Rules of Court, 1875, *Order* XVII. *r.* 2; *Order* XIX. *r.* 3; *Order* XXII. *r.* 9—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3.

The provision of rule 2 of Order XVII., that no cause of action, except those specified in that rule, shall, unless by leave of the Court, be joined with an action for the recovery of land, applies to a counter-claim as well as to an original action.

Order made to exclude a counter-claim, on the ground that in it such a joinder of causes of action had been made without the leave of the Court, and that the fair trial of the action would be embarrassed.

ADJOURNED SUMMONS.

The Plaintiff in this action claimed a declaration that he was entitled to a charge upon a house and thirty-three acres of land situate at *Hornchurch*, in *Essex*, belonging to the Defendant, *W. R. Preston*, for certain sums due to him from *Preston*, in priority to the charges of the other Defendants; an account of what was due to the Plaintiff from the Defendant *Preston*; payment to the Plaintiff by the Defendants of what should be found due to him; and foreclosure of the Defendants in default of payment.

The *Imperial Bank* (*Limited*), one of the Defendants, delivered a statement of defence and counter-claim. By their counter-claim they alleged that in July, 1873, the Defendant *Preston* was seised in fee simple, free from incumbrances, of four acres of land adjoining the thirty-three acres to which the action related; that on the 8th of July, 1873, *Preston* mortgaged the four acres with other property to three persons named *Rickards*, and that this mortgage was afterwards transferred to the bank. The bank alleged that the Plaintiff had taken possession of the four acres, and that he refused to deliver up possession thereof to the bank, although he had no title thereto. The bank also alleged that on the 10th of April, 1871, the Plaintiff executed a lease to the Defendant *Preston* of fifty-one acres of land, also adjoining the

thirty-three acres, at a rent of £250 per annum; that the lease contained a recital that, as consideration for the lease, the Plaintiff had received a premium of £1500 from *Preston*; and that *Preston* thereupon received large sums of money from the bank upon a deposit of the lease; and that the Plaintiff now alleged that the lease was fictitious, and that no premium was in fact paid. The bank alleged that they acted on the statement contained in the lease that the £1500 had been paid, and in the belief thereby induced that the lease was a valuable property, and that they had suffered great damages in consequence of such wrongful representation by the Plaintiff. The bank further alleged that only a rent of £175 had been claimed by the Plaintiff from *Preston* under the lease, and that he and the bank were entitled to the benefit of the lease at a rent of £175. And the bank claimed a declaration that they were entitled to the possession of the four acres, with mesne profits since the occupation thereof by the Plaintiff, and to hold and dispose of the lease at a rent of £175, and that the lease might be rectified accordingly; and damages in respect of the wrongful statement that the Plaintiff had received £1500 for the lease. No leave had been obtained from the Court to join the claim for a declaration that the bank were entitled to possession of the four acres with the other claims. On the 13th of March, 1882, the Plaintiff, not having delivered any reply, took out a summons, asking that the counter-claim of the bank might be struck out, on the ground that it would prejudice and delay the trial of the action, and was embarrassing.

Cookson, Q.C., and *Jason Smith*, for the summons.

The counter-claim is really an action to recover land, and another cause of action is joined with it which has no connection with the first. It will very much embarrass the fair trial of the action. The other Defendants have no interest in the questions which are raised by the counter-claim. No cause of action other than those mentioned in rule 2 of Order XVII. (1) can be joined

(1) Order XVII. rule 2: "No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land, except claims in respect of mesne profits, or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract

FRY, J.
1882
COMPTON
v.
PRESTON.

with an action for the recovery of land without the leave of the Court, and no leave has been obtained for the purpose.

Medd, for the bank:—

The Plaintiff is precluded by his delay from raising this objection to the counter-claim. Since the delivery of the defence and counter-claim on the 16th of January last, he has amended his statement of claim, and has thus led the Defendant to believe that he had no objection to make. According to rule 9 of Order XXII., the application ought to be made before reply. This must mean within the three weeks allowed by rule 1 of Order XXIV. for delivering a reply; the Plaintiff cannot enlarge the time for objecting to the counter-claim by thus keeping open the time for reply. No doubt there is some inconsistency between rule 9 of Order XXII. and rule 3 of Order XIX., and on some grounds a counter-claim might be excluded at the trial, as in *Barber* v. *Blaiberg* (1).

[FRY, J.:—There I held that what was called a counter-claim was really not a counter-claim at all.]

The right given by sect. 24, sub-s. 3, of the *Judicature Act* to a defendant to raise any claim against the plaintiff in the same action is almost without limit: *Beddall* v. *Maitland* (2); *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brooks* (3); *Hodson* v. *Mochi* (4); *Attwood* v. *Miller* (5); and this right is not

---

under which the same or any part thereof are held."

Rule 3 of Order XIX. provides that "the Court or a Judge may, on the application of the plaintiff *before trial*, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

Order XXII. rule 9: "Where a defendant by his statement of defence sets up a counter-claim, if the plaintiff, or any other person named in manner aforesaid as party to such counter-claim, contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may, *at any time before reply*, apply to the Court or a Judge for an order that such counter-claim may be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just."

(1) 19 Ch. D. 473.
(2) 17 Ch. D. 174.
(3) 2 Ex. D. 243.
(4) 8 Ch. D. 569.
(5) Weekly Notes, 1876, p. 11.

cut down by rule 2 of Order XVII., which applies only to an original action, not to a counter-claim. The same evidence will apply to the action and the counter-claim.

This is really not a claim for the recovery of land; it only asks a declaration of right. Therefore rule 2 of Order XVII. does not apply: *Gledhill* v. *Hunter* (1).

Cookson, in reply:—

The counter-claim is in substance what used to be called an action of ejectment, and the rule always was that in such an action the Defendant need do nothing but call on the Plaintiff to prove his case. There is no reason why rule 2 of Order XVII. should not apply to a counter-claim just as it does to an original action. In the cases cited the counter-claims sounded in damages only. They do not apply to the present case.

FRY, J.:—

The Plaintiff sues as mortgagee of certain land at *Hornchurch*, and asks for a declaration of his priority over the charges of other mortgagees who are Defendants. The *Imperial Bank*, one of the Defendants, have delivered a counter-claim, which has two objects: 1, a declaration that they are entitled to the possession of another adjoining piece of land of which the Plaintiff has taken possession, and which is not in question in the original action; 2, damages for an alleged misrepresentation contained in a lease executed by the Plaintiff as to the consideration which he received for granting it, this lease not being in question in the original action. There is, therefore, no intimate connection between the subject matters of the counter-claim and the original action, though, at the same time, it is very possible that some of the evidence in the action may also be evidence upon the counter-claim. The Plaintiff applies to have the counter-claim struck out on the ground that it is embarrassing, and that it will prejudice and delay the trial of the action. The rules relating to the matter are Order XIX., r. 3, and Order XXII., r. 9. [His Lordship read them.] No doubt there is some little difficulty in harmonizing these two rules. The one provides that on the application

(1) 14 Ch. D. 492.

FRY, J.
1882
COMPTON
v.
PRESTON.

of the Plaintiff *before trial*, the Court may, in certain circumstances, refuse permission to the Defendant to avail himself of his counter-claim; the other provides that in certain circumstances the Plaintiff may *at any time before reply* apply to the Court for an order that the counter-claim may be excluded. The difficulty does not, however, arise in the present case, because the Plaintiff is making his application before either the reply or the trial. The point which has been mainly urged is the provision of rule 2, of Order XVII., that no cause of action (except certain specified causes), shall, unless by leave of the Court or a Judge, be joined with an action for the recovery of land. The present counter-claim seeks to set up two causes of action; the first, a right to recover land, the other a right to damages for deceit. No leave has been obtained, or indeed asked, to join the two causes of action. The Defendants contend that rule 2 of Order XVII. does not apply to a counter-claim. It is to be observed, however, that the terms of the rule are perfectly general, and it is difficult to see why a counter-claim for the recovery of land is not an action for the recovery of land. At any rate that which is embarrassing if joined in a statement of claim with an action to recover land is likely to be embarrassing if joined in a counter-claim for the recovery of land. And, further, it would be absurd to hold that that which cannot be joined with a claim to recover land can be joined with a counter-claim for the same purpose, for then the mere fact that a Plaintiff claims a trivial amount of damages would release the Defendant from the fetter of the rule and enable him without the leave of the Court to join any cause of action with a counter-claim to recover land. Then it is important to inquire what are the principles on which the rules relating to actions for the recovery of land are founded. They are explained by *Jessel*, M.R., in *Gledhill* v. *Hunter* (1). All these rules appear to me to apply equally whether the claim to recover land is raised in an original action or by a counter-claim. I think, therefore, that the joinder of the two causes of action in the counter-claim is in its nature embarrassing, and I shall make an order excluding the Defendant from the benefit of the counter-claim.

It has been urged that the Plaintiff has lost his right to object

(1) 14 Ch. D. 492.

to the counter-claim by delay. I am unable, however, to find anything like an admission by the Plaintiff that the counter-claim is part of the action, and there is therefore nothing which can preclude him from applying for an order to exclude it before the delivery of his reply. The Defendant must pay the costs of the adjournment of the summons into Court.

Solicitors for Plaintiff: *R. S. Taylor, Son, & Humberi.*
Solicitors for Bank: *Maples, Teesdale, & Co.*

W. L. C.

HILL *v.* MIDLAND RAILWAY COMPANY.

[1882 H. 1883.]

Railway—Compulsory Powers—Lands Clauses Consolidation Act, 1845 (8 *Vict.* c. 18), *s.* 85 [*Revised Ed. Statutes, vol. ix., p.* 648]—*Easement—Compensation.*

A railway company was entitled by a special Act to acquire compulsorily an easement of tunneling under land, unless a jury should determine that such easement could not be acquired by the company without material detriment to the remainder of such land:—

Held, that the company might enter upon the land for the purpose of making the tunnel under sect. 85 of the *Lands Clauses Consolidation Act* upon depositing the value of the easement, and could not be compelled to deposit the value of the whole land.

29 Ch D 683, 694

THIS was a motion to restrain the *Midland Railway Company* from entering upon certain lands of the Plaintiff in *Hampstead* on part of which houses had been built for the purpose of making a tunnel under the said land, until an agreement should have been come to, or compensation should have been settled, or until the company should have deposited in pursuance of the *Lands Clauses Act* such a sum as should be determined to be the value of the whole of the Plaintiff's land, and should have given a bond as provided by the Act.

By the 31st section of the *Midland Company's Act*, 1880 (in which the *Lands Clauses Consolidation Acts* were incorporated), it was provided that, "whereas it may happen that portions only of

FRY, J.
1882
HILL
v.
MIDLAND
RAILWAY CO.

certain lands shewn on the deposited plans will be sufficient for the purposes of the company, and that such portions may be severed from the remainder without material detriment thereto; therefore, notwithstanding sect. 92 of the *Lands Clauses Consolidation Act*, 1845, unless the jury shall determine that such portions cannot be severed from the remainder of such properties without material detriment thereto, the owners of the lands described in the first schedule to the Act (which included the Plaintiff's land) and whereof parts only are required for the purposes of the Act, may be required to sell and convey to the company the portions only of the properties so required without the company being obliged or compellable to purchase the whole or any greater portion thereof."

By the 33rd section of the same Act, it was provided, that "Persons empowered by the *Lands Clauses Consolidation Act*, 1845, to sell and convey or release lands may grant to the company any easement, right, or privilege (not being an easement of water) required for the purposes of the Act in, over, or affecting lands, and the provisions of the *Lands Clauses Acts* with respect to lands and rent-charges as far as the same are applicable in that behalf shall extend and apply to such easements."

By the 43rd section of the *Midland Company's Act* of 1881 (in which the *Lands Clauses Acts* were incorporated) it was enacted, that "whereas the *Belsize Tunnel*, authorized by the Act of 1880, is intended to be constructed . . . . at a depth of fifty feet below the surface of the ground. Therefore the company may purchase and acquire the easement or right of constructing that tunnel through or under the said lands and hereditaments without being obliged to purchase the surface of the land over such tunnel unless the jury shall determine that such right or easement cannot be acquired by the company without material detriment to the remainder of such lands or hereditaments."

The company gave the Plaintiff's solicitors a notice to treat for the easement or right of constructing the *Belsize Second Tunnel* under the Plaintiff's land on the 30th of January, 1882, and on the 10th of February, 1882, the Plaintiff's solicitors wrote to the solicitors of the company that such easement could not be acquired by the company without material detriment to the lands under

which the tunnel would pass, and that such lands were parts only of certain houses within the meaning of the 92nd section of the *Lands Clauses Act*, and that the Plaintiff required the company to purchase and acquire the whole of the said houses and not only the easement or right of constructing the tunnel under the said houses.

On the 14th of April, 1882, the company gave the Plaintiff notice that they intended to exercise the powers of entry given them by the 85th section of the *Lands Clauses Act*, and to apply to the Board of Trade for the appointment of a surveyor to determine the value of the easement, or right of constructing the tunnel through or under the land in accordance with the provisions of the Acts.

The Plaintiff contended that the notice to the Board of Trade should be amended, and their surveyor should be instructed to make a valuation of the lands and houses over the tunnel, so that the Plaintiff might have a sufficient security under the 85th section of the *Lands Clauses Act;* but the company refused to allow the notice to the Board of Trade to be so amended, and a surveyor was, in accordance with the original notice, appointed by the Board of Trade to estimate the amount to be deposited as a security under the 85th section of the *Lands Clauses Act* for the purpose of enabling the company to construct the tunnel.

The Plaintiff thereupon brought this action to restrain the company from entering on the land for the purpose of making the tunnel unless they included the whole of the houses in their notice to treat, and gave their bond for the value thereof in accordance with the Act.

There had been no determination by a jury under the 43rd section of the Act of 1881.

Cookson, Q.C., *Smart*, and *Castle*, for the Plaintiff:—

The company must pay for the whole of the land: *Pinchin* v. *London and North Western Railway Company* (1). They cannot take an easement alone compulsorily: *In re Metropolitan District Railway Company and Cosh* (2). The amount to be paid under sect. 85 of the *Lands Clauses Act* is shewn by *Field* v. *Carnarvon*

(1) 5 D. M. & G. 851. (2) 13 Ch. D. 607.

FRY, J.
1882
HILL
v.
MIDLAND
RAILWAY CO.

Railway Company (1); *Giles* v. *London, Chatham, and Dover Railway Company* (2).

The jury will perhaps determine that the lands and houses must be taken; so the amount to be deposited as a security ought to be sufficient to cover the value of the land and houses.

Cozens-Hardy, Q.C., and *Phipson Beale*, for the Defendants, were not called on.

FRY, J., after reading the 31st and 33rd sections of the *Midland Railway Company's Act*, 1880, and the 43rd section of the Act of 1881, continued:—

It is obvious that the legislature contemplated the probability of this tunnel being constructed at a depth of fifty feet without serious injury to the ground above. The railway company now propose to enter, after having obtained the valuation of the surveyor appointed by the Board of Trade, under the 85th section of the *Lands Clauses Act*. The Plaintiff, on the other hand, says that the Defendants are bound to take the entirety of the four houses and gardens, and that is the question which I have now to decide.

The Plaintiff puts his case upon three grounds. In the first place, he says that the 43rd section of the Act of 1881 gives no power to the railway company to take compulsorily, but that it merely gives power to the company to acquire, provided the landowner be willing to sell.

[His Lordship considered the clause, and held that the section was intended to enable the company to acquire the easement compulsorily if the landowner were not minded to convey voluntarily.]

The next argument upon which the Plaintiff relies is this. He says that the 84th and 85th sections of the *Lands Clauses Act* do not authorize the entry of the company upon his lands before the compensation has been assessed, for it is said that this easement, or right to construct the tunnel, is not "lands" within the meaning of the word as used in the 85th section. I turn to the interpretation clause of the Act, and I find that the word "lands"

(1) Law Rep. 5 Eq. 190. (2) 1 Dr. & Sm. 406.

is declared to extend to tenements and hereditaments of any tenure, and I ask myself whether this easement, or the right to construct this tunnel, is or is not a hereditament of some tenure. It appears to me to be plainly a hereditament. It is a right to enter upon the land to construct a tunnel, and to enjoy and use that land for particular purposes; and, therefore, if the matter stood there, it would appear to me to be plainly within the interpretation clause.

But then it is said (and said with perfect truth) that there are decisions which shew that generally easements are not included within the word "lands" in the 85th section. But why are they not included? Not because they are not hereditaments within the meaning of the 85th section, but simply because there is usually no power to take an easement. That is the defect in the ordinary scheme of legislation with regard to railways which prevents easements coming within the scope of the definition of the word "lands." But that defect is remedied in the present case by an express power that an easement may be taken; and if it is a hereditament which may be taken, it seems to me plainly to come within the meaning of the 85th section of the *Lands Clauses Consolidation Act*, 1845. I am bound to apply that Act to these Acts of 1880 and 1881, and finding the power given to take an easement, I must apply the sections of the general Act to that easement if they are applicable. So the cases which Mr. *Smart* has referred to do not seem to apply to this case, because the 85th section will apply to an easement of this description, where there is an express power given to take the easement.

Then arises the third point which has been discussed, which is this. What is the amount which the railway are required to deposit under the 85th section? Is it the amount which the surveyor assesses as payable in respect of the right or easement of making this tunnel? or is it the amount which would be payable in the event of it being shewn that it would be detrimental to the land above for the tunnel to be made? and in consequence of which the Plaintiff says he has the right of requiring the company to take the whole of his four houses.

Now that inquiry must be answered in this way. What are the lands which are required to be purchased or permanently

FRY, J.
1882
HILL
v.
MIDLAND RAILWAY CO.

taken? Now the only lands at the present moment which are required to be purchased are the right or easement, and for this reason, that it is not until the jury or arbitrators have determined that the tunnel cannot be constructed without risk that there is any right in the landowner to require the railway company to take the whole of his land. That is a right which arises when and if and not until there has been that finding. Therefore there is no right at the present moment to require the railway company to take the whole land, or to have the value of the whole land assessed under the section.

Then it is argued that the decisions upon the effect of the 92nd section shew that the Legislature intended by the 85th section to give an indemnity in respect of all the risk to which the landowner might be exposed. But the answer is plain. Under the general Act, if the company require the landowner to sell a part of his house he may require them to take the whole, or, to put it more exactly, the railway company cannot require him to convey part, if he is willing to sell the whole, without taking the whole; and if he has said he is willing to convey the whole, then the lands required to be taken are the whole. The two cases, therefore, are in no way parallel.

That conclusion at which I have arrived appears to me to be in exact accordance with the intention of the Legislature. The Legislature thought that the company had made out a *primâ facie* case to shew that at the depth of fifty feet their tunnel would do no harm, and that unless that *primâ facie* case could be rebutted by the landowner before the jury, or before the arbitrator, the landowner was to have no right whatever to require them to take the other portion of the land.

I think, therefore, that the railway company are justified in the present state of circumstances, and before any finding by a jury in favour of the Plaintiff, in insisting upon their right to enter upon the space to be occupied by their tunnel upon depositing the assessed value of that right or easement, and without depositing any further moneys.

That being my view of this case, I reject the motion.

Solicitors: *Cowdell, Grundy, & Co.; Beale, Marigold, & Co.*

C. W. C.

In re ALEXANDRA PALACE COMPANY.

FRY, J.

1882

April 29; *May* 5, 6.

Company—Winding-up—Director—Misfeasance—Payment of Dividend out of Capital—Money borrowed to pay Dividend—Measure of Damages—Shareholders and Creditors Parties to Breach of Trust—Indemnity—Delay—Stale Demand—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165 [*Revised Ed. Statutes, vol. xiv. p.* 238.]

The articles of association of a company provided that all dividends on shares should be made only out of the clear profits of the company, and that all moneys borrowed by the company and all moneys received under insurances of the company's property against destruction or damage by fire should be deemed capital.

A building of the company having been destroyed by fire, the company resolved to increase the capital by £150,000 for the purpose of reconstructing the building, and to issue for this purpose 15,000 preference shares. These shares were issued, and during the reconstruction of the building, no profits having been earned by the company, the directors paid four dividends on the shares. The first dividend was paid out of moneys received from an insurance company in respect of the loss occasioned by the fire. The other three dividends were paid by means of moneys borrowed expressly for the purpose from the contractors of the company and a financial company, both of whom had notice of the purpose for which the money was borrowed, and both of whom held a large number of the preference shares:—

Held, that the directors were, under sect. 165 of the *Companies Act*, 1862, jointly and severally liable to pay to the liquidator the amount of the first dividend.

But with respect to the other three dividends, *held*, that the result of the transactions, as a whole, had been only to increase the amount of the proofs against the company by the amount of the loans, and that consequently the directors were jointly and severally liable to pay to the liquidator only such a sum as would enable him to pay on all the debts of the company a dividend equal to that which would have been paid on all the debts (other than the loans), in case no proof had been made in respect of the loans.

But, *held*, that the order must be made without prejudice to the right of the directors to be indemnified by any shareholders or creditors of the company who were parties or privies to the payment of the dividends out of capital, and that three months from the date of the Chief Clerk's certificate of the amount payable by the directors must be given to them to make the payment.

The dividends in question were paid in January and July, 1874, and in January and July, 1875. The order to wind up the company was made in

FRY, J.

1882

In re ALEXANDRA PALACE COMPANY.

November, 1876. A liquidator was appointed in December, 1876; he afterwards retired, and his successor was appointed in December, 1878. The summons against the directors was issued in February, 1880:—

Held, that there had been no such delay as to disentitle the liquidator to make the application.

Stringer's Case (1) and *In re Mammoth Copperopolis of Utah* (2) distinguished.

ADJOURNED SUMMONS.

This was a summons by the official liquidator of the *Alexandra Palace Company*, under sect. 165 of the *Companies Act*, 1862, asking that *James Goodson*, *M. J. Power*, *Henry Grüning*, *Charles Magnay*, Major *J. A. C. Gore*, and *James Murray*, formerly directors of the company, might be ordered to pay to the applicant jointly and severally the sum of £12,671 19*s.* 8*d.*, being the aggregate amount of the several sums paid by them as directors of the company out of capital to the holders of 6 per cent. first preference shares of the company by way of interest upon the amounts paid up or credited thereon respectively, together with interest on the said sum of £12,671 19*s.* 8*d.*, at the rate of 5 per cent. per annum, from the times at which the said several sums were respectively paid by way of interest.

The summons was issued on the 13th of February, 1880. Afterwards, on the application of *Grüning* and *Magnay*, the summons was amended by adding thereto, as Respondents, the *London Financial Association* and Messrs. *Kelk & Lucas*, on the ground that the directors were entitled to an indemnity from those Respondents.

The company was registered on the 13th of September, 1866. The memorandum of association stated the objects for which the company was established to be (*inter alia*) "To provide at *Muswell Hill*, in the county of *Middlesex*, buildings, with gardens, lakes, grounds, and all requisite appliances and arrangements for the recreation, amusement, and instruction of visitors, and the encouragement of national sports and pastimes; to purchase, acquire, and hold any lands, buildings, or hereditaments of any tenure which may be conveniently held by or may be made useful to the company in connection with their other property; to charge and receive

(1) Law Rep. 4 Ch. 475. (2) 50 L. J. (Ch.) 11.

moneys for admission to their buildings or grounds, or for the use of any part of the same by exhibitors or other persons." The liability of the members was limited, and the nominal capital of the company was fixed at £400,000, divided into 20,000 shares of £20 each.

The articles of association contained the following clauses :—

12. "The company may, from time to time, with the sanction of a special resolution, increase the capital by new shares, whether the whole of the shares then for the time being issued shall have been fully paid up or not, and whether the whole of the shares then for the time being issuable shall have been issued or not.

13. "All capital raised by new shares shall (except so far as the company otherwise determine) be considered as part of and shall be subject to the same provisions in all respects as the original capital. But the company may, when determining on an increase of the capital, determine also by special resolution the conditions on which the capital shall be increased, and the time, mode, and terms at, in, and on which the new shares shall be issued, and how the premiums, if any, on the new shares shall be applied, and may likewise determine that the then unissued original or other shares or any of them shall be cancelled.

14. "Any general meeting determining on the conditions on which any new shares shall be issued, may determine that the new shares shall be issued in one class or in several classes, and may attach to the new shares of all or any of the classes any special privileges with reference to preferential, guaranteed, fixed, fluctuating, redeemable, or other dividends or interest, or otherwise, or any special conditions or restrictions."

Clause 17 gave the board of directors power to borrow money on mortgage of the company's property, or on bonds or debentures or other security.

20. "The amount of all calls and moneys paid to the company in respect of shares, and all moneys borrowed, and all moneys raised or produced by sale, conversion, or realizing of the property or any part thereof, and all premiums on leases of the property or any part thereof; and all payments and considerations in money, shares, or securities for the concession of any rights, easements, or privileges in or over the property or any part

FRY, J.
1882
In re ALEXANDRA PALACE COMPANY.

thereof; and all moneys received under insurance of the property against destruction or damage by fire, or wreck, or perils of the sea, shall be deemed capital.

52. "All dividends and bonuses on shares shall be declared at the ordinary general meetings, and shall be made only out of the clear profits of the company; and no dividend or bonus shall exceed the sum recommended to the meeting by the board."

In December, 1866, the nominal capital of the company was increased to £550,000.

The company constructed on their land at *Muswell Hill* a large building known as the *Alexandra Palace*, which was opened to the public on the 24th of May, 1873. It was destroyed by fire on the 9th of June, 1873. The directors considered that it was necessary to raise £150,000 new capital for the purpose of rebuilding the Palace. A general meeting of the company was held on the 14th of July, 1873, when a special resolution was passed, which was confirmed on the 5th of August, 1873, to increase the capital from £550,000 to £700,000. And it was resolved that the £150,000 by which the capital was thus increased should be issued in 15,000 shares of £10 each, which should bear a preferential dividend of 6 per cent. per annum, and should rank in all respects in priority to the preference and ordinary shares theretofore issued. A prospectus was issued inviting applications for the new shares, which stated that £1 per share was to be paid on application, £1 10*s.* on allotment, £2 10*s.* on the 15th of October, 1873, £2 10*s.* on the 15th of January, 1874, and £2 10*s.* on the 15th of April, 1874, and that "interest will commence from the respective days of payment, but any applicant desirous of paying in full may do so in advance at any of the above dates." The whole of the 15,000 shares were subscribed for. Messrs. *Kelk & Lucas*, the contractors for the rebuilding of the Palace, subscribed for 2395 shares, and the *London Financial Association* subscribed for 2395 shares. On the 1st of May, 1875, the rebuilt Palace was opened to the public. A profit was made upon the working until October, 1875, but after that the business was carried on at a loss, and there was no profit for the year 1875 as a whole, nor was there any profit for the year 1876.

In January, 1874, the directors applied to Messrs. *Kelk & Lucas*

for a temporary loan of £2050 to enable them to pay (*inter alia*) interest amounting to £1436 6*s.* 8*d.* on the amount paid on the 6 per cent. preference shares down to the 31st of December, 1873, and they at the same time applied to the *London Financial Association* for a temporary loan of the same amount for the same purposes. These loans were made on the 6th and 8th of January, 1874, and out of the sums so received the £1436 6*s.* 8*d.* for interest was paid to the holders of the preference shares. On the 10th of January, 1874, the sum of £4000 was received by the company from an insurance company in respect of the losses occasioned by the fire, and the two loans of £2050 were then repaid.

In July, 1874, the directors borrowed two sums of £3000 each from *Kelk & Lucas* and the *London Financial Association* respectively, upon the security of bonds of the company, and out of the £6000 thus received interest or dividend at the rate of 6 per cent. up to the 30th of June, 1874, was paid to the holders of the preference shares, the sums thus paid amounting to £3838 18*s.* 1*d.*

In January, 1875, the directors borrowed two sums of £5000 each from *Kelk & Lucas* and the *London Financial Association* upon the security of bonds of the company, and out of the £10,000 thus received interest at the rate of 6 per cent. up to the 31st of December, 1874, was paid to the holders of the preference shares, the sums thus paid amounting to £4462 10*s.*

In June, 1875, the directors borrowed two sums of £3055 each from *Kelk & Lucas* and the *London Financial Association*, and out of the £6110 thus received interest at the rate of 6 per cent. up to the 30th of April, 1875, was paid to the holders of the preference shares, the sums thus paid amounting to £2934 4*s.* 11*d.* These loans were not secured by bonds of the company.

On each of these occasions *Kelk & Lucas* and the *London Financial Association* received interest on the preference shares held by them respectively, and in each case, as the evidence shewed in the opinion of the Court, they knew that the money was borrowed in part for the purpose of paying the interest, and that the interest was paid out of the borrowed money.

The sums thus paid for interest amounted in the whole to £12,671 19*s.* 8*d.*, and this was the sum which the liquidator claimed to have paid to him by the directors.

FRY, J.
1882
In re ALEXANDRA PALACE COMPANY.

A petition to wind up the company was presented on the 12th of October, 1876, and on the 24th of November, 1876, a winding-up order was made. In December, 1876, an official liquidator was appointed. He afterwards retired, and on the 4th of December, 1878, his successor was appointed, and he, on the 13th of February, 1880, issued the present summons. *Kelk & Lucas* and the *London Financial Association* proved in the winding-up in respect of the loans above mentioned, as well as for other sums which they had lent to the company.

Power died before the hearing of the summons.

Glasse, Q.C., and *Speed*, for the summons:—

These dividends have been improperly paid out of capital, and the directors are liable to make them good. The liquidator has under sect. 165 of the *Companies Act*, 1862, an independent right to make this application: *In re National Funds Assurance Company* (1).

W. W. Karslake, Q.C., and *E. Beaumont*, for *Goodson, Gore, & Murray*:—

This is a stale demand which the Court will not entertain after the time which has elapsed: *In re Mammoth Copperopolis of Utah* (2). It is the duty of the liquidator to inquire of every one connected with the company, and these transactions might have been discovered long ago. The liquidator's solicitors were the solicitors of the company. The directors, if they are liable to repay the dividend, have a right to an indemnity from the persons who have received the dividends, and that right is imperilled by delay. But these dividends were not really paid out of capital, and at any rate it was essential that money should be raised to carry on the company, and it could be raised only on the terms of interest being paid on the shares during the reconstruction of the buildings, and the directors were therefore justified in paying interest: *Bardwell* v. *Sheffield Waterworks Company* (3); *Holmes* v. *Newcastle-upon-Tyne Freehold Abattoir Company* (4).

(1) 10 Ch. D. 118.
(2) 50 L. J. (Ch.) 11.
(3) Law Rep. 14 Eq. 517.
(4) 1 Ch. D. 682.

[FRY, J., referred to *Macdougall* v. *Jersey Imperial Hotel Company* (1).]

Indeed the prospectus issued to invite subscriptions for the preference shares led the public to believe that interest would be paid out of capital. The loans were made expressly to pay the interest, and cannot be treated as an increase of the company's capital. The only damage caused to the company and the creditors by the last three loans is that the debts proved by *Kelk & Lucas* and the *London Financial Association* have been increased by the amounts of those loans. That will not diminish the dividend by more than 1*d.* in the pound. The lenders have no right to prove for these loans: *Yorkshire Railway Wagon Company* v. *Maclure* (2).

W. Barber, Q.C., *Northmore Lawrence*, and *Dauglish*, for *Grüning*:—

The delay is fatal to the application: *In re Mammoth Copperopolis of Utah* (3); *Stringer's Case* (4). *Kelk & Lucas* and the *London Financial Association* are very much the largest creditors of the company, so that the application is really made for their benefit. They knew that the money borrowed of them was to be applied to an illegal purpose, and they are not entitled to prove for it against the company. The liquidator could get their proofs expunged. Sect. 165 only gives a summary remedy in lieu of an action; it applies only when the company has sustained damage: *Coventry & Dixon's Case* (5). The Court will take into consideration on whose behalf the liquidator is acting: who will get the benefit of the application. The shareholders have no right to recover from directors dividends which have been paid out of capital; it is only creditors who have that right. Here the persons who will get nineteen-twentieths of the benefit of the application were parties to and, indeed, instigated the transactions which are now called in question. At any rate, an inquiry should be directed, and the summons should stand over to enable the directors to take proceedings against *Kelk & Lucas* and the

(1) 2 H. & M. 528. 10 Jur. N.S. 1043. (3) 50 L. J. (Ch.) 11.
(2) 19 Ch. D. 478. (4) Law Rep. 4 Ch. 475.
(5) 14 Ch. D. 660.

FRY, J.
1882
In re ALEXANDRA PALACE COMPANY.

London Financial Association. The £1436 6*s.* 8*d.* was improperly repaid to them out of the insurance money, and could be recovered from them.

H. Burton Buckley, for *Magnay*:—

The dividends were not really paid out of capital. It is quite proper to debit to capital account the interest on capital expended on works, such as buildings, so long as they are unproductive during the period of construction. The value of a building is not merely the sums actually expended on it, but the interest which those sums would have produced had they been bearing interest during the period of construction.

The liquidator can enforce the rights, not only of the creditors as a whole, but of a particular class of creditors. He can enforce the rights of those creditors who had no notice of these transactions. The Court will separate the two classes, and allow only the rights of those who had no notice to be enforced. The damages should be assessed on this principle. The £12,671 19*s.* 8*d.* which is claimed should be diminished by that part of it which was paid to *Kelk & Lucas* and the *London Financial Association.*

Cookson, Q.C., *Everitt*, Q.C., and *Medd*, for the *London Financial Association*:—

There is no issue raised as against us. This is a proceeding under sect. 165, and, if there be any right to relief against us, it cannot be enforced on this summons. Our costs ought to be provided for.

J. Pearson, Q.C., for *Kelk & Lucas*, asked for their costs.

Glasse, in reply:—

The *London Financial Association* and *Kelk & Lucas* were served at the instance of *Grüning & Magnay.* As to the question of delay, *In re Mammoth Copperopolis of Utah* (1) is distinguishable. There the Vice-Chancellor thought the only object was to obtain payment of the liquidator's costs. And he misunderstood

(1) 50 L. J. (Ch.) 11.

Stringer's Case (1), the ground of which was that the dividend had been paid on the footing of a *bonâ fide* estimate of profits at the time. There has been no unreasonable delay here; a complicated investigation of the affairs of the company had to be made.

FRY, J. (after stating the nature of the application and referring to the above-stated clauses of the company's articles of association), continued:—

According to the view which I take to be the reasonable one of the construction of these articles, I think that the interest which would be payable on the new shares must be either dividend or in the nature of dividend, and that it is payable only out of the profits of the company. [His Lordship then read the resolutions of the meeting of the 14th of July, 1873, and continued:—]

It has been argued that by those resolutions the company undertook to pay the dividends on the new shares out of funds other than profits; but it appears to me that they bear no such construction. The only right given to the new shareholders is a right to a preferential dividend, but under the articles of association every dividend is payable out of profits, and out of profits only. I think the true reading of the special resolutions is to give to the holders of the preference shares a first dividend at the rate of 6 per cent. out of profits, then to give the holders of ordinary shares a dividend up to the amount of 6 per cent. out of profits, and, if any profits should remain after paying those two dividends, to allow the ordinary and preferential shareholders to divide them equally or proportionately.

The company entered into contracts with Messrs. *Kelk & Lucas* for the purpose of reconstructing the Palace, and practically the company was, to use a common expression, "financed" by *Kelk & Lucas* and the *London Financial Association*, who seem to have been interested in it substantially in equal moieties.

In January, 1874, the company borrowed £2050 from Messrs. *Kelk & Lucas*, and a similar sum from the *London Financial Association*, and a portion of those sums was applied legitimately in payment of the debts of the company, but, to the extent of £1436 6*s.* 8*d.*, the sums so borrowed were applied in paying what

(1) Law Rep. 4 Ch. 475.

FRY, J.
1882
In re ALEXANDRA PALACE COMPANY.

was called a dividend upon the preference shares. In no proper sense was it a dividend, because there were no profits out of which to pay it, and it was certainly in substance a payment out of the capital of the company.

Shortly after this borrowing and shortly before the actual payment of the interest warrants, a sum of £4000 was received by the company on an insurance of the building, and they applied that sum in repaying to Messrs. *Kelk & Lucas* and the *London Financial Association* the two sums of £2050 which they had borrowed from them respectively. The result of that transaction was therefore this, that the £4000, which under the articles of association was capital of the company, was, to the extent of £1436 6*s.* 8*d.*, applied, not in payment of any debt of the company, but in payment of this so-called preferential dividend to the shareholders.

Again, in July of the same year another transaction took place of a very analogous description. Sums of £3000 each were borrowed from Messrs. *Kelk & Lucas* and the *London Financial Association*, and warrants were issued for the payment of dividends to the preference shareholders to the extent of £3838 18*s.* 1*d.*, which were accordingly paid out of the £6000 thus borrowed.

In this instance this peculiarity arises, that the money was borrowed to a certain extent for the payment of the dividend, and was applied accordingly. The payment, therefore, did not take place out of any money which was originally an asset of the company, but it took place out of money borrowed for that purpose. It is said that the moment the money was borrowed it became under the articles of association an asset of the company, and that therefore the whole £3838 18*s.* 1*d.* was withdrawn from the assets of the company, and ought now to be repaid. That is perfectly true, if I look at part only of the transaction; but, looking at the whole transaction, what I find is this, not that the assets of the company have been diminished by £3838 18*s.* 1*d.*, but that the proofs against the company in the winding-up have been increased to that extent. That appears to me to be the true view of the transaction, and the true measure, so to speak, of the compensation which the Court ought to require in respect of the transaction. It would not, in my view,

be fair to pause in the middle of the transaction, when the money borrowed has become capital, and then to make the directors who were parties to the transaction liable for the whole sum.

Similar observations apply to the sums of £4462 10*s.* 0*d.* and £2934 4*s.* 11*d.* which in January and June, 1875, respectively were borrowed and applied in payment of the dividend warrants of the company. With regard to the sum paid in June, it has been contended that it was really paid out of the profits of the company. But I am unable to come to any such conclusion. It appears that the company opened their new building in May, 1875, and, that, taking their accounts from May, 1875, only down to the 31st of October, they made a profit of £8000, but the general meeting which was held in December had not before it any materials, as it appears to me, for declaring a dividend, and I do not understand that any dividend was declared at that meeting. There is nothing to shew that any part of the £8000 had been retained to pay the preference dividend in June, and I think I am bound to treat that payment as made out of moneys borrowed for the purpose.

These being the short facts of the case, numerous arguments have been addressed to me. The official liquidator says that this is a clear case of payment of dividend out of the capital of the company. On the other hand it is contended, in the first place, that it is not a payment out of capital at all. Mr. *Buckley* has very ingeniously argued that this was really a payment out of profits (so at least I understood his argument), because, he says, you are entitled to compute interest on the money you lay out before it becomes remunerative, and to treat that interest as profit and divide it accordingly among the shareholders. I cannot yield to that argument. It appears to me that the calculation which is suggested is a mere "paper" transaction, to use a common expression, and to say that a company can pay their shareholders interest, because they can compute interest on the money they choose to lay out in building, and which is for the time being unproductive, is not an argument which can commend itself to the Court.

In the next place, Mr. *Karslake*, with more courage, has argued that it was necessary for the company to raise this money, and that they could not raise it except upon the terms of paying

FRY, J.
1882
In re ALEXANDRA PALACE COMPANY.

interest on it during the course of the construction of the building, and that, therefore, despite the clear language of the articles of association, they were at liberty so to do. That argument I cannot yield to for one moment. I do know the obligation which rests on directors to be honest, but I know of no obligation to pay dividends unless they have profits out of which to pay them.

That view is one which it appears to me necessary to enforce strongly, considering the nature of the arguments which have been addressed to me, and I cannot enforce it more strongly than by calling attention to the language of Lord *Hatherley* (when Vice-Chancellor *Wood*) in *Macdougall* v. *Jersey Imperial Hotel Company* (1). That case came before the Court on a demurrer, and the Vice-Chancellor said, "The bill avers that there are no profits, and that interest has been paid, or is about to be paid, out of capital; that the shareholders have paid £4 per share, and are discharged to that extent, and that they are now about to take back sums equal to £5 per cent. of that very capital in the shape of interest" (which is exactly what has been done here) "On grounds of public policy, and on every principle, not only of honesty as regards the public generally, but of the interests of this company itself, I feel bound to prevent this proceeding. This is not in accordance with the contract entered into with the Legislature on behalf of the public, whereby it was determined that the shareholders should be liable to a certain defined amount and no more, to the creditors of the company, and not in accordance with the contract between the parties, whereby each shareholder was protected against creditors to the extent of the contributive liability of all the others." In my view that lays down the law with perfect precision, and I think no subterfuge by which it is attempted to return capital to shareholders, and thereby to diminish their liability, ought to be countenanced for one moment by this Court. I confess it was with some surprise that I heard the argument addressed to me at the Bar, that the directors were at liberty to pay this money out of capital, because otherwise they could not carry on their undertaking.

2 C.L.D. 361

Then arises the question, what is the proper measure of the liability of the Respondent directors in respect of these sums?

(1) 2 H. & M. 528, 535. 10 Jur. N.S. 1063-4

With regard to the £1436 6*s.* 8*d.*, it appears to me to have been directly, or, if not directly, circuitously, abstracted from the assets of the company, and I think therefore that the Respondents are jointly and severally liable to repay that sum, together with interest thereon, from the time when it was abstracted from the assets of the company by payment of the dividend. That interest has, I believe, in many cases been computed at £5 per cent. The other three sums, as I have already pointed out, stand in a different position, because, looking at the whole transaction in each case, it has only resulted in an increase to the extent of those sums of the proofs against the company. Therefore, I think the proper measure of compensation in those cases is to direct the Respondents, jointly and severally, to pay to the liquidator such a sum of money as will enable him to pay on all the debts proved in the winding-up such a dividend as would have been payable on all the debts of the company, other than those three sums, in case no proof had been made of those three sums, and I propose to declare the liability of the Respondents accordingly.

Then arises this contention. It is said, and, as it appears to me on the evidence, with perfect truth, that Messrs. *Kelk & Lucas* and the *London Financial Association* were parties and privies to these transactions. They were parties to some of them, at any rate in respect of the lending of the moneys, because some of the loans at any rate were made with the knowledge of the lenders that they were to be applied in payment of dividend. *Kelk & Lucas* and the *London Financial Association* were also interested in this way, that, by themselves or their nominees, they were large holders of the shares on which the dividend was paid, and, therefore, both as lenders to the company and as receivers from the company, they were implicated in these transactions. At the same time it appears that there are other independent shareholders, and that there are creditors of the company who are in no way affected by knowledge of these transactions.

Therefore, I propose to declare that my order shall be without prejudice to the rights of the Respondents against any creditors or shareholders of the company who were party or privy to these transactions, or any of them, and I propose to give a considerable time for the payment of the sums which I hold that the directors

FRY, J.
1882
In re ALEXANDRA PALACE COMPANY.

are liable to pay, in order that they may take such steps as they may be advised, whether in the winding-up or by independent proceedings, to enforce their rights against the persons from whom they say they are entitled to an indemnity.

One matter remains for consideration, with respect to which, I confess, I have felt very considerable doubt, and that is the question of delay. [His Lordship stated the material dates and continued:—] These dates do not differ materially from the dates in *In re Mammoth Copperopolis of Utah* (1), in which Vice-Chancellor *Hall* considered that the staleness of the demand was a sufficient answer to the application of the official liquidator. If the two cases had been precisely parallel I should have felt myself bound to follow that decision, but it appears to me that they are not. In that case the directors had declared a dividend upon the footing of a balance-sheet which had been made up, and which I think, according to the view of the Vice-Chancellor, was made up in a *bonâ fide* manner, although there might be grave questions as to the propriety of it. He considered that the liquidator's application was in fact an attempt to unravel the balance-sheets which had been passed and acted upon, and I observe that in stating the considerations which led him to the conclusion that the demand was stale, he dwells in the first place upon the nature of the demand.

Similar observations apply to *Stringer's Case* (2). There an attempt was made to compel a director to repay a dividend said to have been paid out of capital, by means of attacking three items in a balance sheet which had been passed and acted upon. There also, the Court thought that the delay was a sufficient answer. In the present case there is nothing of that sort. The transaction stands disclosed in the simplest way. There is no balance sheet which it can be for a moment suggested induced the directors to come to the conclusion that there were divisible profits. It is a simple case in which the capital of the company or the moneys borrowed by the company were applied in the payment of that which, according to the plain terms of the articles of association, could be paid only out of profits.

I think, therefore, that the observations made in those cases do

(1) 50 L. J. (Ch.) 11.

(2) Law Rep. 4 Ch. 475.

not apply, and I must ask myself whether independently of them, and on general principles, I can hold that this is so stale a demand that the Court ought to grant no relief. It is to be borne in mind that, although directors are not strictly trustees, they are persons who stand in a fiduciary position towards the company, and that the acts which are complained of were committed by them in their fiduciary character. If I ask myself whether after the lapse of time which has occurred, the mere staleness of the demand (for no *Statute of Limitations* is suggested), is an answer to the demand, it appears to me that it is not. I think, therefore, that I am bound to grant the relief which I have mentioned.

There remains only the question of the costs of the two sets of Respondents who have been made parties to the summons at the instance of two of the directors who are Respondents. It appears to me that they have been improperly made Respondents. They were undoubtedly much mixed up with these transactions, but I think they are not liable to have their rights discussed on a summons taken out by the official liquidator against the directors. Therefore, although somewhat unwillingly, I must require Messrs. *Grüning* and *Magnay*, at whose instance Messrs *Kelk & Lucas* and the *London Financial Association* were added as parties, to pay the costs of these Respondents. The Respondent directors must pay the liquidator's costs of the summons.

No question has been raised as to any diminution of the general liability by reason of any of the Defendants not having been parties to any particular acts, but all the Defendants have by their counsel taken upon themselves *in solido* the liability for all the acts. I shall therefore declare that the Respondent directors are jointly and severally liable to pay to the liquidator, first, the sum of £1436 6*s.* 8*d.* with interest at £5 per cent. from the date of the payment of the dividend warrants of the 15th of January, 1874, and, secondly, such a sum of money as will enable the liquidator to pay on all the debts proved against the company such a dividend as would have been payable on all those debts (other than the three sums of £3838 18*s.* 1*d.*, £4462 10*s.*, and £2934 4*s.* 11*d.*, and interest), in case no proof had been made of those sums and interest or any of them. Then I shall direct an inquiry as to what that amount will be, and I shall declare that

FRY, J.
1882
In re ALEXANDRA PALACE COMPANY.

the order is to be without prejudice to the rights of any of the Respondent directors against any creditors or shareholders who were parties or privies to the transactions. I will give three months after the Chief Clerk's certificate has been made upon this inquiry for the directors to make the payment.

Solicitors for Liquidator: *Dawes & Sons.*

Solicitors for directors: *Fladgate & Co.*; *Tathams & Pym*; *Trinders & Curtis-Hayward.*

Solicitors for *Kelk & Lucas*: *Fladgate & Co.*

Solicitors for *London Financial Association*: *C. & S. Harrison & Co.*

W. L. C.

FRY, J.
1882
May 11.

FRAMPTON *v.* STEPHENS.

[1882 F. 179.]

Husband and Wife—Dower—Divorce—20 & 21 *Vict. c.* 85 [*Revised Ed. Statutes, vol. xiii. p.* 251].

A wife having obtained a decree for dissolution of marriage in the Court for Divorce and Matrimonial Causes on the ground of her husband's misconduct:—

Held, by so doing to have lost her right to dower.

THE question for decision in this case was whether the female Plaintiff, who had obtained a divorce from her husband on the ground of his misconduct and had survived him, was entitled to dower out of the real estate whereof he was seised at the time of his dying intestate.

The Plaintiff was married to her late husband in 1859 and a settlement was executed on her marriage, but it was not expressed that the provision thereby made for the Plaintiff should be in lieu of dower.

On the 8th of December, 1874, a decree *nisi* was pronounced by the Judge of Her Majesty's Court for Divorce and Matrimonial Causes for the dissolution of the marriage on the ground of the adultery and cruelty of the husband, and on the 3rd of August, 1875, the decree was made absolute.

On the 21st of January, 1875, the Plaintiff filed a petition in

the same Court for permanent alimony and for alteration of the marriage settlement and for an allowance to the children of the marriage, and on the 4th of May, 1875, it was ordered by the same Court that the Plaintiff should be allowed by her husband the sum of £150 per annum in trust for the maintenance and support of the two children who were issue of the said marriage so long as they should remain in her custody, and the husband agreed to pay forthwith the sum of £2500 which had been received by him in right of the Plaintiff to trustees for her three children, and the Plaintiff agreed to make no further claim upon her husband for maintenance for herself or her children or any application to vary the marriage settlement, and this agreement was carried into effect on the part of the husband.

The husband died in August, 1878, intestate as to every part of his real and personal estate.

The plaintiff married again on the 25th of May, 1881.

This action was instituted by the Plaintiff for the purpose of having it declared that she as late wife of her said deceased husband was entitled to dower out of certain hereditaments to which he was entitled for an estate of inheritance in fee simple in possession at the date of his marriage, and thenceforth up to and at the time of his death.

The action came on to be heard on a demurrer to the statement of claim by the heir-at-law of the husband.

Glasse, Q.C., and *G. Edwards*, for the demurrer:—

The right to dower always ceased on a divorce being granted by the Ecclesiastical Courts: Co. Lit. (1); and the Court of Divorce and Matrimonial Causes has the same power as those Courts had: 20 & 21 Vict. c. 85, ss. 16, 17; 22 & 23 Vict. c. 61, s. 4. The provision made by the Court for the Plaintiff and her children was granted in consideration of her right to dower having gone.

J. Pearson, Q.C., and *Stallard*, for the Plaintiff:—

The Plaintiff obtained an inchoate right to dower on her marriage which has never been taken from her.

In private divorce Acts a provision was always inserted that the

(1) 32 a.

FRY, J.
1882
FRAMPTON
v.
TEPHENS.

wife should have no claim to dower, which seems to shew that otherwise she would have been entitled to it. The wife only lost her dower by a dissolution of marriage where the marriage was void *ab initio*: *Bracton* (1); *Britton* (2); *Evans* v. *Carington* (3); *Fitzgerald* v. *Chapman* (4).

[FRY, J., referred to *Bacon's* Abridgement; *Stephen's* Blackstone (5); *Bury's Case* (6); *Stephen's* Blackstone (7); *Salkeld's* Reports (8).]

Glasse, in reply:—

In *Powell* v. *Weeks* (9) it is said "that a divorce *causâ adulterii* is no bar of dower, because it is but *à mensâ et thoro* and not *à vinculo matrimonii*."

If the husband married again his second wife would be entitled to dower, and therefore the divorced wife must be excluded.

FRY, J.:—

The question I have to determine is whether the dissolution of the Plaintiff's marriage with her late husband put an end to the right to dower which she would have otherwise had. The effect of the statute 20 & 21 Vict. c. 85, is that while a judicial separation is to have the effect of the old judgment for divorce *à mensâ et thoro*, a decree of the Court for dissolution of marriage has had the effect of a divorce *à vinculo matrimonii*.

The question, then, is did a divorce *à vinculo matrimonii* under the old law put an end to the right to dower. The first authority to which reference has been made, no doubt a very important one, is a passage in *Coke* upon *Littleton* (10).

He says: "For the better understanding whereof it is to be known that (as hath been said) to dower three things do belong, viz., marriage, seizin, and the death of the husband." Then, after after referring to the time of seizin, he says, "It is necessary that the marriage do continue, for if that be dissolved the dower ceaseth

(1) Page 51.
(2) Ch. 8.
(3) 2 D. F. & J. 481.
(4) 1 Ch. D. 563.
(5) 8th Ed. vol. ii. p. 258.
(6) 5 Co. 98 b.
(7) 8th Ed. vol. ii. p. 277.
(8) 6th Ed. vol. iii. p. 138.
(9) Noy's Rep. 108.
(10) 32 a.

ubi nullum matrimonium ibi nulla dos. But this is to be understood when the husband and wife are divorced *à vinculo matrimonii*, as in case of precontract, consanguinity, affinity, &c., and not *à mensâ et thoro* only, as for adultery." Now the language of Lord *Coke* is, in my judgment, very plain; he lays down the general rule that where a marriage is dissolved during the lifetime of the parties the wife loses her right to dower. No doubt he goes on to specify certain cases of dissolution of marriage, as, for instance, for precontract, and it is said that Lord *Coke* only intended to say that dower was barred by divorce *à vinculo matrimonii* when it was by reason of something making the marriage void *ab initio*, which at the time of Lord *Coke* was a cause for such divorce. Perhaps it is enough to say that is not the manifest meaning of Lord *Coke*, who refers to the special case only by way of illustration. But then Lord *Coke* refers to the authority of *Bracton*, and his language is quite plain. Having referred to the apportionment of dower, he says [I am reading from Sir *Travers Twiss's* translation], "If it (the marriage) be impeached and dissolved in any manner there ceaseth to be dower; when matrimony fails, there ceaseth to be the right to dower. Nor ought any one, in regard to one husband, in a petition of dower to make answer to two wives." In a later passage, referring to various kinds of dower, he repeats the statement, as I understand, in regard to all. "Likewise," he says, "the man sometimes gains the dower by law during the lifetime of the woman, where a divorce is celebrated between them for whatever reason, but not if there be only a separation of bed."

Now it appears also by the old authorities that a divorce might have been "celebrated," to use the language of *Bracton*, not only for causes preceding marriage but for adultery after marriage. An account of the old law is found in *Stephen's* Blackstone (1) and in *Salkeld's* Reports (2). It is said that divorce for adultery was anciently *à vinculo matrimonii*; and in the 44th year of Queen *Elizabeth* that opinion changed, and it was held that adultery was only a cause of divorce *à mensâ et thoro*. These authorities also state the distinction between divorce *à vinculo matrimonii* and divorce *à mensâ et thoro* in their effect upon dower. *Salkeld* says,

(1) 8th Ed. vol. ii. p. 277. (2) 6th Ed. vol. iii. p. 138.

FRY, J.
1882
FRAMPTON
v.
STEPHENS.

"a divorce *à vinculo matrimonii* is a bar of dower; but a divorce *à mensâ et thoro* is not, for the marriage still continues, and therefore the parties thus divorced cannot marry again during their joint lives." The same is expressed in the passage in *Noy* (1), which was referred to in the argument.

I think therefore the law is well established that divorce *à vinculo matrimonii* was a bar to dower under the old law, and I think it equally plain that the decree in question in this action effected a divorce *à vinculo matrimonii*, from which it follows, in my judgment, that the wife has lost her right.

Two objections to that conclusion have been raised. In the first place, it is said that it would be a hardship on an innocent wife that she should lose her right on account of the misconduct of her husband. The answer to that seems to me to be that the Divorce Court has power to make provision for her and her children, and no doubt the Court would have regard to the legal effect of the divorce in making such provision.

The other argument is that, in private Acts of Parliament for divorce, it was usual to insert a clause expressly barring the dower. But that was only part of a common clause dealing with other matters, and was only introduced *ex abundanti cautelâ*, and as declaratory of the common law. I come, therefore, to the conclusion that the wife has lost her right, and I must allow the demurrer.

Solicitors: *Saunders, Hawksford, & Bennett.*

(1) Page 108.

C. W. C.

WOOLLEY *v.* COLMAN.

FRY, J.

1882

June 6.

[1882 W. 1681.]

Mortgage—Redemption Action—Order for Sale—Conduct of Sale—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 25.

Under sect. 25 of the *Conveyancing and Law of Property Act*, 1881, the Court has power in a redemption action to order a sale of the mortgaged property on an interlocutory application made before the trial of the action by a person interested in the equity of redemption.

In an action by the owner of the equity of redemption of property subject to several mortgages for the redemption of the mortgages, the Plaintiff, soon after the issue of the writ, applied by summons for an order giving him liberty to sell the mortgaged property, and asking that he might have the conduct of the sale. The first and second mortgagees opposed the application, the others supported it:—

Held, that an order for sale ought to be made, but that a reserved price must be fixed large enough to cover what was due on the first and second mortgages, and that the Plaintiff must give security for the costs of the sale. The conduct of the sale was given to the Plaintiff on the ground that he was more interested than the first or second mortgagees in obtaining as large a price as possible for the property.

And it was ordered that the sale should take place out of Court, and that the proceeds of sale should be paid into Court.

ADJOURNED SUMMONS.

This action was brought for the redemption of several mortgages of some property in which *H. J. Bedford*, the mortgagor, was interested under some leasing agreements, dated the 23rd of September, 1880.

On the 24th of September, 1880, *Bedford* assigned his interest under the agreements to the *British Property Investment Company* by way of mortgage to secure £5000, to be advanced by them to him at the times therein mentioned, a bonus of £900, and interest. On the same day *Bedford* charged his interest under the agreements with the payment of £450 and interest to *R. D. Strong*. On the 22nd of November, 1880, *Bedford* charged his interest under the agreements with the payment of £100 and interest to *H. C. Cobbold* and *E. A. Woolley*. On the 12th of January, 1881, the *British Property Investment Company* assigned

FRY, J.
1882
WOOLLEY
v.
COLMAN.

to *Nicholl Morgan* the amount which was then due to them under their mortgage of the 24th of September, 1880, and also the bonus due to them thereunder and the property comprised therein, by way of mortgage to secure a debt then due by them to *Morgan*. On the 5th of April, 1881, *Bedford* mortgaged his interest under the leasing agreements to *R. Russell* and *C. Cowley* to secure £216 and further sums to become due to them, and interest. On the 6th of May, 1881, *Russell* and *Cowley* assigned their interest under the mortgage of the 5th of April, 1881, to *C. G. Boxall* and *A. A. Boxall* by way of mortgage to secure £400 and interest. On the 10th of June, 1881, *Bedford* absolutely assigned all his interest under the leasing agreements (subject to the mortgages by him above stated) to *E. A. Woolley*. In August, 1881, *Russell* and *Cowley* filed a liquidation petition, under which *J. M. Henderson* was appointed trustee of their property. On the 5th of April, 1882, the *British Property Investment Company* assigned the leasing agreements and the property expressed to be assigned by the mortgage of the 24th of September, 1880, to *William Colman* and *John Clemence* by way of mortgage to secure the repayment of £5000 and interest. Leases of the property comprised in the leasing agreements were, on the 21st of April, 1882, granted by the lessor to the *British Property Investment Company*, in pursuance of the agreements.

This action was commenced on the 26th of April, 1882, by *Woolley* against *Coleman* and *Clemence*, the *British Property Investment Company*, *Strong*, *Henderson*, *Cobbold*, *C. G Boxall*, and *A. A. Boxall*, and *Morgan*, claiming an account of what should be due upon the several mortgages by *Bedford* of the 24th of September, 1880, the 22nd of November, 1880, and the 5th of April, 1881, and redemption of the property comprised therein.

On the 6th of May, 1882, the Plaintiff took out a summons, asking that he might be at liberty to sell the mortgaged property, that he might have the conduct of the sale, and that the money to arise from the sale might be paid into Court to the credit of the action.

According to the evidence there was due on the two mortgages of the 24th of September, 1880, to the *British Property Investment Company* and to *Strong*, between £7700 and £7800.

Glasse, Q.C. and *A. A. Terrell*, for the summons :—

Sect. 25 (1) of the *Conveyancing and Law of Property Act*, 1881, gives power to make the order. The Court can impose any conditions as to costs or otherwise.

Cookson, Q.C., and *T. Ribton*, for *Colman* and *Clemence*, and for *Strong* :—

There is no power to make the order on an interlocutory application. Sect. 25 is moulded on sect. 48 of the Act 15 & 16 Vict. c. 86, under which it was held that an order for sale could not be made on an interlocutory application, but only at the hearing: *Wayn* v. *Lewis* (2).

[FRY, J. :—In sect. 48 the power to direct a sale was given expressly "instead of a foreclosure," and those words are omitted from sect. 25 of the Act of 1881.]

The mere omission of those words does not deprive a mortgagee of his right to a foreclosure, and it would be contrary to the course

(1) "Sect. 25: (1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

"(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage-money, the Court on the request of the mortgagee, or of any person interested either in the mortgage-money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage-money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

"(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

"(4.) In any case within this section, the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

"(5.) This section applies to actions brought either before or after the commencement of this Act.

"(6.) The enactment described in Part II. of the Second Schedule to this Act (*i.e* sect. 48 of the Act 15 & 16 Vict. c. 86) is hereby repealed."

(2) 1 Drew. 487.

FRY, J.
1882
WOOLLEY
v.
COLMAN.

of practice to order a sale before the trial. The words "at any time" have not been inserted in sect. 25, as they were in sect. 55 of the Act 15 & 16 Vict. c. 86, and, notwithstanding those words, it was held in *London and County Banking Company* v. *Dover* (1) that in an ordinary foreclosure action a sale could not be directed on an interlocutory application.

[FRY, J.:—That was only a decision that sect. 55 did not apply to a foreclosure action.]

The evidence as to the value of the property is too unsatisfactory to enable the Court to exercise its discretion.

At any rate the conduct of the sale ought not to be given to the mortgagor: *Hewitt* v. *Nanson* (2). It ought to be given to us.

J. Pearson, Q.C., and *T. L. Wilkinson*, for the *British Property Investment Company*, and for *Morgan*:—

The property ought not to be sold before the regular time. It is not a matter of course to direct a sale: *Hurst* v. *Hurst* (3).

Such a reserved price ought to be fixed as will be sufficient to pay off the first and second mortgages, and the conduct of the sale ought to be given either to the first mortgagees or to us.

Seward Brice, for Messrs. *Boxall*, and *E. Ford*, for *Henderson*, supported the application.

Glasse, in reply:—

Sect. 48 of the Act 15 & 16 Vict. c. 86, is expressly repealed by sect. 25 of the *Conveyancing and Law of Property Act*, 1881, and *Union Bank of London* v. *Ingram* (4) shews that under sect. 25 an order for sale may be made at any stage of a foreclosure action before an order absolute for foreclosure. The conduct of the sale should be given to the Plaintiff.

FRY, J. (after stating the facts), continued:—

The first question is this—is it competent to the Court to make an order for sale on an interlocutory application, or is the power

(1) 11 Ch. D. 204.
(2) 7 W. R. 5.
(3) 16 Beav. 372.
(4) 20 Ch. D. 463.

which is conferred by sect. 25 of the *Conveyancing and Law of Property Act*, 1881, to be exercised only at the trial of the action. In my judgment it is clear that the Court has power to make the order on an interlocutory application. In the first place, the section simply gives the Court power to direct a sale "on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption." The only condition precedent is that request, and then the discretionary power of the Court arises. It is contended that the power of the Court is restricted by reason of the decisions upon sect. 48 of the Act 15 & 16 Vict. c. 86, which conferred a somewhat similar power on the Court of Chancery. But there the power to direct a sale was given to the Court only "instead of a foreclosure of such equity of redemption." A foreclosure decree could be made only at the hearing of the suit, and consequently the power to direct a sale instead of a foreclosure could be exercised only at the hearing. But the words "instead of a foreclosure" are wanting in sect. 25 of the *Conveyancing and Law of Property Act*, 1881, and I can see no reason why I should fetter the power of the Court with a restriction which is not to be found in the words of the section. Nor do I see any reason in the nature of things why such a restriction should be imposed. In a case like the present there will be a great saving of time and expense in making the order at the present stage of the proceedings. I think that in a fitting case an order for sale can be made on an interlocutory application. I will make this further observation. Sub-sects. 1 and 2 of sect. 25 are expressed in different terms, and it appears to me that they confer distinct and separate powers. I hold, therefore, that I have power to make the order for sale now.

Then the question arises whether, under the circumstances of this case, I ought to exercise my discretion, and to order a sale. I think that I ought. I must have regard to the interests of the first and second mortgagees who oppose a sale, and I must fix such a reserved price as will protect their interests and at the same time not render the sale abortive, and I ought to provide for their costs. The third and fourth mortgagees support the application. I think the reserved price ought to be £8000. The property would be damaged if I were to fix a price which is not

FRY, J.
1882
WOOLLEY
v.
COLMAN.

likely to be reached. The next question is, who ought to have the conduct of the sale? No doubt there is some convenience in giving the conduct to the persons who have possession of the title deeds, but, on the other hand, they have no interest in obtaining a price more than sufficient to pay their own mortgage debt. The persons whose interest it really is to obtain the largest price are the third and fourth mortgagees and the mortgagor, and the third and fourth mortgagees wish the mortgagor to have the conduct. Therefore, I shall give the conduct to him. The next question is, what security ought to be given for the costs of the sale, and I think the Plaintiff ought to give security for £150. The Plaintiff must bear his own costs of the application in Chambers; the mortgagees will add their costs to their securities respectively. The costs of the adjournment into Court must be paid by those Respondents who opposed the application, for the adjournment took place really on the question of the power of the Court to make the order, and upon that point I hold that they were entirely in the wrong. The sale will take place out of Court, in accordance with the order of the Court of Appeal in *Union Bank of London* v. *Ingram* (1), but the purchase-money must be paid into Court.

Solicitor for Plaintiff: *H. W. Chatterton.*

Solicitors for Defendants: *Bellamy, Strong, & Baker; Nicholl Morgan; J. W. Sykes; Boxall & Boxall.*

(1) 20 Ch. D. 463.

W. L. C.

ANDREW *v.* AITKEN.

FRY, J.

1882

June 6.

[1880 A. 1293.]

Revivor—Counterclaim—Rules of Court, 1875, *Order* XIX., *r.* 3; *Order* L.

On the death of a defendant who has delivered a counterclaim, it is necessary that his representatives, if they wish to prosecute the counterclaim against the plaintiff in the original action, should obtain an order of revivor against him.

An order of revivor of the original action obtained by the Plaintiff against them does not authorize them to prosecute the counterclaim against him.

THIS was an action for the specific performance of an agreement. The defendant delivered a statement of defence and a counterclaim. On the 6th of December, 1881, the Plaintiffs gave the Defendant notice of trial, and on the 7th of December the action was set down for trial. On the 26th of February, 1882, the Defendant died. He had made a will appointing executors, by whom his will was proved on the 7th of May, 1882. On the 10th of May, 1882, the Plaintiffs obtained an order in the original action that the proceedings therein should be carried on and prosecuted against the executors of the Defendant, in like manner as the same might have been carried on and prosecuted against the Defendant if he had not died.

The Defendant's executors desired to obtain an order giving them liberty to carry on and prosecute the counterclaim against the Plaintiffs in the original action, in like manner as the same might have been carried on and prosecuted by the Defendant if he had not died. The Registrar refused to draw up an order of course.

G. A. Watson, for the executors, now moved *ex parte* for the order:—

A counterclaim is really an independent action, and on the transmission of the Defendant's interest by reason of his death, an order in the nature of an order of revivor is necessary, just as in

FRY, J. 1882 ANDREW v. AITKEN.

the case of an original action: *Beddall* v. *Maitland* (1); *Lumsden* v. *Winter* (2); Order XIX., rule 3; Order L.

FRY, J.:—

I think you are right on principle. I must make the order.

Solicitors: *Pitman & Son.*

W. L. C.

FRY, J. 1882 *June* 12.

CORPORATION OF HYDE *v.* BANK OF ENGLAND.

[1882 H. 2008.]

Local Board — Incorporation of District — Vesting of Property—Government Stock—Bank of England—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 310—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 22.

The words "council of such borough" in sect. 310 of the *Public Health Act*, 1875, mean the mayor, aldermen, and burgesses acting by the council.

The effect of the section, therefore, is that, when the district of a local board is incorporated as a borough all the property of the board (including property acquired by them by purchase after the passing of the Act) vests at once in the corporation, without the necessity of any conveyance or transfer.

In such a case the *Bank of England* are bound, on the request of the corporation, to register in their corporate name Government stock previously standing in the books of the bank in the name of the local board, without requiring any transfer to be executed.

DEMURRER.

This action was brought to compel the Governor and Company of the *Bank of England* to register the Plaintiffs in their books as entitled to a sum of £545 13*s.* 1*d.* Consols, and to pay the dividends thereon to the Plaintiffs.

The statement of claim contained the following allegations:—

On the 9th of February, 1881, the local board for the district of *Hyde*, in the county of *Chester*, purchased the above-mentioned sum of consols, which was shortly afterwards registered in the books of the *Bank of England* in the name of "The *Hyde* Local Board, *Hyde, Chester*." This sum was an investment made, pur-

(1) 17 Ch. D. 174. (2) 8 Q. B. D. 650.

suant to sect. 234 (4) of the *Public Health Act*, 1875, of moneys received by the board in respect of private improvements from rates levied by them under that Act. Subsequently, by an order of Her Majesty in Council and a charter of incorporation dated the 18th of February, 1881, the district of the local board was constituted a borough, and thereupon, under and by virtue of sect. 310 of the *Public Health Act*, 1875, all the powers, rights, duties, capacities, liabilities, obligations, and property exercisable by, attaching to, or vested in the board passed to and became exercisable by and vested in the Plaintiffs. The bank refused to register the above-mentioned sum of consols in the name of the Plaintiffs, or to pay them the dividends thereon.

The Plaintiffs claimed a declaration that they were entitled to the said sum of consols and to the dividends due or to become due thereon, and to all the rights of registered stockholders in respect of the said stock; and an order on the Defendants to pay the dividends then due, and all future dividends as they should accrue due, on the said stock to the Plaintiffs, and to register the Plaintiffs as entitled to the said stock in the books of the *Bank of England*.

The Defendants demurred to the statement of claim on the ground that the facts alleged therein did not shew any cause of action or any matter of law or equity whereon the Court could ground any judgment or give to the Plaintiffs any relief.

The question in dispute turned on the construction of sect. 310 of the *Public Health Act*, 1875.

Kekewich, Q.C., and *W. Latham*, for the demurrer:—

Unless it is "otherwise provided by Act of Parliament" Government stock can be transferred only in the way pointed out in sect. 22 of the *National Debt Act*, 1870 (33 & 34 Vict. c. 71), *i.e.*, by an entry in the books of the *Bank of England* of a transfer "signed by the party making the transfer." Sect. 310 of the *Public Health Act*, 1875, has not the effect of making any other provision, and the only way of obtaining a transfer is under the *Trustee Act*, 1850. The legal estate in the stock is not vested in the Plaintiffs by sect. 310, and the bank can have regard only to the legal estate. Some one ought to be appointed to transfer the

FRY, J.
1882
CORPORATION OF HYDE v. BANK OF ENGLAND.

fund: *King of Hanover* v. *Bank of England* (1). In *In re Smyth's Settlement* (2) it was held that an order under sect. 35 of the *Trustee Act*, 1850, vesting in new trustees the right to call for a transfer of stock, would not vest in them the right to the stock, or entitle them to compel the bank to transfer the stock into their names, without a transfer in the ordinary way.

Again, sect. 310 (3) says that the property to which it refers is to vest "in the council of such borough." The council of the borough is not a corporation, and the practice of the bank is to register stock only in the name of a corporation or of individuals not more than four in number.

[FRY, J.:—I am not sure that words as vague as these have not been held to create a corporation: *Willingale* v. *Maitland* (4).]

Other sections of the Act, such as sect. 6, which provides that the urban authority of a "borough constituted such either before or after the passing of this Act" shall be "the mayor, aldermen, and burgesses acting by the council," shew that it cannot have been intended to make the council a corporation.

Moreover, the effect of sect. 310 is to vest in the new authority only property which was vested in the local board under the Act itself or under some other Act (such as property which is vested in them by sects. 12 and 13), but it does not apply to property which the local board acquired, as they did this stock, by purchase after the Act of 1875 came into operation. Such stock was not vested in the local board "under the Act." In *Attorney-General* v. *Birmingham, Tame and Rea Drainage Board* (5) it was held, on the construction of similar words in sect. 275 of the Act, that a

(1) Law Rep. 8 Eq. 350.

(2) 4 De G. & Sm. 499.

(3) Sect. 310: "Where, after the passing of this Act, a district, or part of a district, under the jurisdiction of improvement commissioners, or a district, or part of a district, under the jurisdiction of a local board, is constituted or included in a borough, all the powers, rights, duties, capacities, liabilities, obligations, and property, exercisable by, attaching to, or vested in such improvement commissioners or local board (as the case may be) under this Act, or under any local Act for purposes the same as, or similar to, those of this Act, or under any general Act of Parliament, within or for the benefit of such district, or part of a district, shall pass to and be exercisable by, and vested in, the council of such borough."

(4) Law Rep. 3 Eq. 103.

(5) 17 Ch. D. 685.

liability not attaching to the corporation of *Birmingham* under the *Public Health Act*, 1875, did not pass to the Defendants, who were made their successors by an order of the Local Government Board.

Cozens-Hardy, Q.C., and *W. Phipson Beale*, for the Plaintiffs:—

This stock was vested in the local board, if not strictly "under" yet "by virtue of" the Act, and that is sufficient to bring it within sect. 310. It was purchased by the board in the exercise of powers given to them by the Act. Though the bank cannot be called on to register the stock in the name of the Plaintiffs unless they have got a legal title to it; *Howard* v. *Bank of England* (1); sect. 310 gives the Plaintiffs the legal as well as the equitable title.

If the words are not sufficient to incorporate the council of the borough, they may be construed as meaning the mayor, aldermen, and burgesses acting by their council. This view is confirmed by sects. 198, 207, 246, 270, taken in connection with sect. 6. The council is the executive body of the corporation, and the expression "council of the borough" is used in sect. 310 and other sections as a short form for "the mayor, aldermen, and burgesses acting by their council." *In re Smyth's Settlement* (2) does not apply, because the property in the stock is vested by sect. 310. The decision in *Attorney-General* v. *Birmingham, Tame and Rea Drainage Board* (3) related to the liability of the Defendants for a wrongful act committed by their predecessors.

Kekewich, in reply.

FRY, J:—

The local board for the district of *Hyde* were duly constituted under the *Public Health Act*, 1875, and under the powers conferred on them by sects. 212, 233, and 234, they did certain improvement works, they levied a private improvement rate, they borrowed money which was to be repaid in the course of ten years, and they set aside the produce of the improvement rate in the purchase of bank annuities, which are the sums now in question. Subsequently to this the Crown was pleased to

(1) Law Rep. 19 Eq. 295. (2) 4 De G. & Sm. 499.
(3) 17 Ch. D. 685.

FRY, J.
1882
CORPORATION OF HYDE v. BANK OF ENGLAND.

grant a charter of incorporation to the district. [His Lordship referred to sect. 310 of the Act, and to sect. 22 of the *National Debt Act*, 1870, and continued:—]

Now, in the first place, it is suggested that the word "property" is not large enough to carry the legal interest in the stock, and that all that is operated on is the equitable interest. I have a difficulty in following that argument, and for this reason, that the legal estate in stock is property just as much as the equitable estate, and the Act says that "all the property vested in such local board under the Act" shall pass. I am bound to give full effect to those words.

My attention has, in the next place, been called to the decision of Vice-Chancellor *Knight Bruce* in *In re Smyth's Settlement* (1). That case only determined that when the *Trustee Act* said that the right to call for a transfer of stock should be vested in new trustees, that did not vest the stock, but only the right to call for a transfer of it. But the present Act says that "the property shall be vested," and it is difficult to see how a decision that words giving a right to call for a transfer do not vest property, shews that words saying that the property shall be vested give only a right to call for a transfer, and do not vest the property. That argument, therefore, appears to me untenable.

In the next place it is said that the property in question is not "property vested under the Act." [His Lordship referred to sects. 12 and 13.] It is said that the property which by force of those particular sections and any similar provisions vested in the local board (if it existed before the passing of the Act of 1875, a point upon which I have no information) on the passing of the Act, that that property and that only is transferred from the local board to the corporation by force of sect. 310. On the other hand, it is contended that "property vested under the Act" includes not only that property but all property which has come to the local board by force and virtue of the exercise of the authorities and powers given to them by the Act. I have come to the conclusion that the latter is the true construction.

In the first place, it is obvious that the general scope and intention of these clauses is to make the corporation the universal

(1) 4 De G. & Sm. 499.

successor to the local board,—to place it as regards all its powers, and as regards all its property also, entirely in the same position as the local board. If it is to have the powers it is natural that it should have the property which either has resulted from the exercise of the powers in the past, or will be acquired by the continued exercise of the powers in the future. Again, I think, the language "vested under this Act" ought not to receive a narrow construction referring only to the particular provisions of the Act; but in its true meaning it appears to me to extend to everything in the nature of property which, if the Act had not passed, would have come to the hands of the board. The local board had the power under the Act of making rates—general rates, and private improvement rates—and had the power of purchasing consols with money so produced for the purpose of forming a sinking fund. All those powers are powers given by the Act. The property resulting to the local board from the exercise of those powers appears to me to be described with reasonable exactitude as "property vested in the local board under the Act."

I have been referred to a decision upon similar words in sect. 275 with regard to the words "liabilities and obligations," but that case only shews that an obligation imposed by a judgment in an action brought against a local board for a nuisance is not a "liability or obligation" created under the Act. Why should it be? The obligation is created by force of the judgment of the Court in consequence of the wrongdoing of the local board. It is not a liability under the Act; it is not an obligation under the Act; it only arises from a wrong committed by the board, and from the ordinary law which gives a right to certain remedies against the wrongdoer. That decision, I think, throws no light whatever upon the true construction of this Act.

Then arises this question. In whom does sect. 310 vest the property? The difficulty arises from the words which vest it nominally in the council. It has been contended that it can only vest an equitable interest. The conclusion at which I have arrived is, that, with very considerable inexactitude and looseness of language, the word "council" is in that section used for the words "mayor, aldermen, and burgesses acting by the council." I arrive at that conclusion, because in the previous legislation,

FRY, J.
1882
CORPORATION OF HYDE v. BANK OF ENGLAND.

particularly in the *Public Health Act* of 1872 (35 & 36 Vict. c. 79), there are sections which shew that the mayor, aldermen, and burgesses acting by the council are treated by the Legislature and spoken of as the council. [His Lordship referred to sects. 4 and 22 of that Act.] In those cases it appears to me reasonably plain that the intention of the Legislature was, not to create a new body corporate consisting of the council alone, but to transfer to the mayor, aldermen, and burgesses the particular powers in question, to be acted upon and exercised by the council. Inasmuch as the council is the soul and the hand of the corporation, there is no great difficulty in using the words "the council" for the body for whom they are to act, for whom they are to deliberate, and on whom their decisions are binding. In the same way, in the Act of 1875, there is strong evidence that the Legislature has used the words "the council" to mean the mayor, aldermen, and burgesses acting by the council. One proof of this is to be found in the 12th section, which provides that the property already vested in the council of any borough is to remain vested in the council. But it appears, from an examination of the earlier Acts by the learned counsel on both sides, that, although much property was previously vested in the mayor, aldermen, and burgesses of a borough, no property was vested in the council, and, therefore, if I were to read the word "council" in its strict and proper sense, and not to hold that it includes "mayor, aldermen, and burgesses," that portion of the 12th section would fail of any operation whatever, whereas, if I read it as a short description of "mayor, aldermen, and burgesses," the intention of the Legislature has effect given to it; the property was vested in the corporation and it continues vested in the corporation.

It is scarcely necessary for me to refer to the many other sections to which my attention has been called, but I will only say that in sects. 198, 207, 246, and 270, similar expressions are to be found, which seem to me to import that the Legislature meant by the "council," the mayor, aldermen, and burgesses, acting by the council. I hold, therefore, that the same meaning must be given to the word "council" in sect 310, and that the effect of that section is to vest in the mayor, aldermen, and burgesses of the borough of *Hyde* the right, not only to receive the dividends

on, but to effect the transfer of the Consolidated Annuities which were part of the property of the local board before the incorporation of the borough.

I, therefore, overrule the demurrer, with costs.

Solicitors for Plaintiffs: *Sharpe, Parkers, & Co.*, agents for *John Hibbert, Hyde.*

Solicitors for Bank: *Freshfields & Williams.*

W. L. C.

MUNSTER *v.* CAMMELL COMPANY.

[1881 M. 2151.]

Company—Director—Casual Vacancy—General Meeting.

The articles of association of a company provided that the directors might fill up any casual vacancy on the board.

A casual vacancy occurred, and before it was filled up by the board a general meeting of the company was held.

The vacancy was not filled up by the general meeting:—

Held, that the power of the board to fill up the vacancy remained.

Semble, the general meeting could have filled up the vacancy.

23 Ch D 35, 40

THIS was a motion to obtain a declaration that the Plaintiff had been duly elected and was entitled to act as a director of the Defendant company, and for an injunction to restrain the Defendants from preventing the Plaintiff from so acting.

The question to be determined was whether the directors of the Defendant company had power, under the circumstances of the case, to fill up a casual vacancy on the board by electing the Plaintiff a director.

The material articles of association were the following:—

Article 76 provided that in certain events therein mentioned the office of director should be vacated.

Article 78 provided that at every ordinary meeting subsequent to the first, three directors (to be determined as therein mentioned) should retire from office.

Article 79 provided that every retiring director should be eligible to be re-elected.

FRY, J.
1882
MUNSTER
v.
CAMMELL
COMPANY.

Article 80 provided that the company at the general meeting at which any directors retired in manner aforesaid should fill up the vacated offices by the election of members duly qualified, but the retiring directors should remain in office until the dissolution of the meeting.

Article 81 provided for the notice to be given to the company by any person intending to offer himself as a candidate for the office of director.

Article 82 provided that if at any meeting at which an election of directors ought to take place the places of the vacating directors were not filled up, the meeting should stand adjourned as therein mentioned.

Article 83 provided for increasing or reducing the number of directors.

Article 84 was as follows: "Any casual vacancy occurring in the board of directors may be filled up by the directors by the election of a member duly qualified, but such person shall retain his office only so long as the vacating director would have retained the same if no vacancy had occurred; the continuing directors may act, notwithstanding any vacancy in their body."

The directors of the Defendant company issued a report to the shareholders, dated the 18th of March, 1882, in which it was stated, amongst other things, that "The board regret to announce the resignation, from indisposition and advancing years, of Mr. *Alfred Peek* as a director, and the loss of his valuable services."

Alfred Peek in fact retired in the month of February, 1882.

On the 29th of March, 1882, an ordinary general meeting of the company was held, and the notice calling such general meeting stated the purposes for which it was called as being, amongst others, to receive and consider the report of the directors; to sanction the declaration of a dividend; to fix the remuneration of the directors; to elect three directors in the place of those retiring; and to transact any other business that might be properly transacted at an ordinary general meeting.

Three new directors were elected at the general meeting in place of three directors, Mr. *T. Dymond*, Mr. *H. Watson*, and Mr. *J. Whitehead*, who retired by rotation.

At a directors' meeting held on the 20th of April, 1882, the

Plaintiff was elected a director of the company, and was informed of his election by a letter from the chairman.

The Plaintiff contended that he was elected in the place of the said *Alfred Peek*, in pursuance of the powers given to the directors to fill up casual vacancies by the 84th article of association.

The Defendant company, on the other hand, contended that the board had no power to fill up the place of Mr. *Alfred Peek* after the ordinary general meeting of the company on the 29th of March, 1882. They contended that a casual vacancy caused by the office of any director being vacated, could not be filled up by the board except in the interval before the next ordinary general meeting took place, and that the directors not having filled up Mr. *Peek's* place prior to the ordinary general meeting on the 29th of March, 1882, their right to do so ceased.

Cookson, Q.C., *J. Woollett*, and *P. S. Gregory*, for the motion:—

The company have no right to exclude the Plaintiff from acting as director: *Pulbrook* v. *Richmond Consolidated Mining Company* (1). The words "casual vacancy" mean any vacancy which occurs otherwise than by retirement of directors in rotation.

J. Pearson, Q.C., and *Kenyon Parker*, for the Defendant company:—

The words "casual vacancy" mean any vacancy which occurs before a general meeting of the company. When a general meeting occurs the power to fill up a casual vacancy reverts to the company, and can no longer be exercised by the body of directors. By article 84 the "continuing" directors are to act notwithstanding a vacancy, which shews that a change of the body at a general meeting pending the vacancy was not contemplated.

FRY, J.:—

In this case the facts are not in dispute. It appears that in February of this year Mr. *Peek*, who had been a director of the company, retired from the direction, and that a general meeting of the company was held on the 29th of March. At that meeting three gentlemen retired from the directorship, and the report,

(1) 9 Ch. D. 610.

FRY, J.
1882
MUNSTER
v.
CAMMELL
COMPANY.

which was dated the 18th of March, and which was prepared for the purposes of that meeting, stated not merely the retirement of these three gentlemen at that meeting, but the resignation from indisposition and advancing years of Mr. *Alfred Peek*. The meeting was held, as I have already mentioned, on the 29th of March. On the 20th of April following, the board of directors elected the Plaintiff, Mr. *Munster*, to be a director of the company in the place of Mr. *Peek*, and that fact was communicated, though somewhat informally, to the Plaintiff by the chairman of the board. Two days afterwards the chairman communicated to the Plaintiff the change of desire on the part of the board of directors. It appears, whether wisely or unwisely, or whether rightly or wrongly, they had altered their minds, and that they did not then desire to have as their colleague that gentleman whom previously they had elected to the vacant office.

The question therefore arises whether the board had the power on the 20th of April to elect the Plaintiff to the vacant office. That must of course be determined by reference to the articles of association. The 76th article of association provides for the vacating of the office of director upon the happening of various contingencies, such as bankruptcy or insolvency, or becoming lunatic, or of unsound mind. The 78th, 79th, 80th, 81st, and 82nd articles constitute a group which all deal, in my judgment, with the vacancies caused by the retirement of directors in rotation. The 78th provides for the system of rotation. The 79th provides that the retiring directors shall be eligible for re-election. The 80th, which is very important, provides that "the company at the general meeting at which any directors retire in manner aforesaid," that is, retire by rotation, as contrasted with the directors whose offices have been vacated under the 79th article, "shall fill up the vacated offices" (that I understand to mean the offices vacated by the directors retiring in manner aforesaid) "by election of members duly qualified, but the retiring directors shall remain in office until the dissolution of the meeting. Then the 81st provides that no person other than a retiring director shall be eligible to supply the place of a director retiring by rotation except he has given a certain notice to the company, and the 82nd article provides that "if at any meeting at which an election of

directors ought to take place, the places of the vacating directors" —that means again, as I read it, the directors retiring at that meeting—"are not filled up the meeting shall stand adjourned." The 83rd section deals with a somewhat different matter. It enables the company in general meeting to increase or reduce the number of directors within certain limits. That refers, not to the filling up of a particular vacancy, but to the determination of the number of gentlemen who shall be from time to time the members of the board. Then the 84th section is in these terms, "Any casual vacancy occurring in the board of directors may be filled up by the directors by the election of a member duly qualified; but such person shall retain his office only so long as the vacating director would have retained the same if no vacancy had occurred; the continuing directors may act notwithstanding any vacancy in their body." What is the meaning of the expression "any casual vacancy?" "Any casual vacancy" in my judgment is any vacancy in the office of directors arising otherwise than by the retirement in rotation pointed out by the previous articles. It includes, therefore, the happening of any of the contingencies referred to in the 76th article, and it has been taken, and as I conceive correctly taken, by both sides to include a vacancy occurring by the voluntary retirement of a director. There was therefore a casual vacancy on Mr. *Peek's* retirement.

Now the article provides that such vacancy may be filled up by the directors. There is no limit to the time within which that power is to be exercised. In the next place the director appointed in the place of the retiring director is to retain office as long as the vacating director would have retained the same—that is, he continues in office or may continue in office beyond the next general meeting.

The question is whether the power which is given in these general terms to the board of directors to fill up any casual vacancy is put an end to by the occurrence of the general meeting. In my judgment it is not so put an end to. I am far from saying that a general meeting might not have filled up the casual vacancy, although, as I have pointed out, the 80th clause only requires the general meeting to fill up the vacancies created by the retirement in rotation; but nevertheless the general powers of

FRY, J.
1882
MUNSTER
v.
CAMMELL
COMPANY.

a general meeting are so large that I certainly do not mean to determine that if they had been so minded, they might not have filled up that casual vacancy. But what they do is this: knowing from the report of the directors (which had been previously circulated, I presume, by the board some thirteen days before the meeting) that the casual vacancy had occurred, and knowing from nothing having been said with regard to its being filled up, that it had not been filled up, the general meeting neither thinks fit to fill it up at the general meeting nor to give any directions with regard to its being filled up. It appears to me, therefore, that they deliberately left that casual vacancy subsisting as a casual vacancy, and I can see no reason why the directors might not after the general meeting fill up the vacancy, which I repeat probably the general meeting might have filled up but did not think fit to fill up. It is obvious to my mind that there are many considerations of convenience which lead to that construction. Suppose, for instance, that the casual vacancy occurs after the issue of the report and after the time limited for giving notice of new business, is it to be said that the casual vacancy cannot be filled up after the general meeting, when the general meeting itself has had no opportunity of considering how they could fill up that casual vacancy? I see no reason whatever for holding that the generality of the 84th section is to be controlled. In my view, although it is not necessary to decide the point, the general meeting might, if they had thought fit, have taken into their hands the duty of filling up that casual vacancy, but they did not think fit to take it into their own hands. They left the power in the hands of the directors, in whom it is in my judgment placed in express terms by the 84th section.

It is suggested by Mr. *Kenyon Parker* that the words "the continuing directors may act notwithstanding any vacancy in their body," put a difficulty in the way of that conclusion. In my judgment they put no such difficulty. "The continuing directors" are the directors who for the time being continue, whether they continue by reason of their having been elected before the vacancy, or whether they continue because they happen to be elected pending the vacancy, they are none the less aptly described as continuing directors. I hold, therefore, that the Plaintiff is

properly appointed, and therefore the injunction must go—following the case before the Master of the Rolls.

FRY, J.
1882
MUNSTER v. CAMMELL COMPANY.

Solicitor for Plaintiff: *C. Stewart King.*
Solicitors for Defendant: *Geare & Son.*

C. W. C.

VAN GHELUIVE *v.* NERINCKX.

FRY, J.
1882
June 15, 16.

[1867 V. 17.]

Judgment—Registration—Priority—Protection of Executor—Order of Administration—4 & 5 Wm. & M. c. 20, s. 3—23 & 24 Vict. c. 38, s. 3 [Revised Ed. Statutes, vol. xiii., p. 606.]

The meaning of sect. 3 of the Act 23 & 24 Vict. c. 38, like that of sect. 3 of the Act 4 & 5 Wm. & M. c. 20, is, not merely that protection is given to an executor or administrator against an action for a *devastavit* by a judgment creditor of the testator or intestate whose judgment has not been registered, but that such a judgment debt is not entitled in the administration of the estate to any priority over the simple contract debts of the testator or intestate.

In re Turner (1) followed.

ADJOURNED SUMMONS.

This suit was commenced in 1867 in the Court of Chancery for the administration of the estate of *Augustus Peter Van Gheluive*, who had died intestate in December, 1866.

The Plaintiff was one of the next of kin of the intestate; the Defendant was his administratrix. A decree for administration was made on the 25th of March, 1867. On the 24th of January, 1871, the Chief Clerk made his certificate, by which he found (*inter alia*) that *James Bainbridge* was a specialty creditor of the intestate for the sum of £3111 9*s.* 1*d.* on a judgment recovered by him, in an action against the intestate in the Court of Common Pleas, on the 18th of July, 1866. This judgment was never registered. It was for a debt of £3000, with interest and costs. The interest amounted to £117 12*s.* 8*d.*, the costs were taxed at £53 0*s.* 8*d.*, and judgment was signed for £3170 13*s.* 4*d.* Before his death the intestate had made a payment on account of the judg-

(1) 12 W. R. 337.

FRY, J.
1882
VAN GHELUIVE v. NERINCKX.

ment, and there remained due to *Bainbridge* the above sum of £3111 9*s.* 1*d.*, with interest. The Chief Clerk found that the interest up to the date of the certificate amounted to £562 12*s.* 5*d.* He also found that the outstanding personal estate of the intestate consisted of some chattels of small value, a balance of £395 due from the Defendant, and two debts, one of £5000 which was due from a company in *Lisbon*, the company being insolvent and in liquidation in the Portuguese Courts; and the other of £11,465, due from *J. F. C. Crispin*. The intestate had no real estate. By the order on further consideration, dated the 22nd of December, 1871, directions were given for the taxation and payment of costs, and inquiries were directed as to the realization of the outstanding debts of £5000 and £11,465. No direction was given as to the payment of the debts of the intestate, there not being then any assets available for the purpose. Some moneys were afterwards realized in respect of the outstanding personal estate, and ultimately, some years after the certificate, there was a sum of £18,688 Consols in Court, which, however, was not enough to pay all the debts of the intestate in full. The debt due from *Crispin* was not realized until January, 1882.

By an order dated the 30th of November, 1881, the conduct of the cause was given to *Frances Holdway*, one of the simple contract creditors so found by the certificate. On the 9th of May, 1882, in pursuance of leave previously obtained, she took out a summons, asking that the Chief Clerk's certificate might be varied by striking out from the list of specialty creditors the debt of *Bainbridge*, together with the interest allowed thereon, and that the sum of £3000 only might be entered as due to him as a simple contract debt.

Everitt, Q.C., and *Byrne*, for the summons:—

It was held that the effect of the Act 4 & 5 Wm. & M. c. 20, s. 3, was to deprive an undocketed judgment of priority over simple contract debts, and in this way the executor was protected from claims founded on undocketed judgments: *Steel* v. *Rorke* (1). This protection was lost by reason of the closing of the docket by the Act 2 & 3 Vict. c. 11, which it was held had

(1) 1 B. & P. 307.

the effect of reviving the law as it stood before the Act of Wm. & M., and thus made an executor liable to an action for a *devastavit* if he paid a simple contract debt before an unregistered judgment of which he had no notice: *Fuller* v. *Redman* (1). To remedy this the Act 23 & 24 Vict. c. 38 was passed, and the effect of sect. 3 (2) is to place unregistered judgments in the same position as against executors or administrators as that in which they stood under the Act of Wm. & M., and they are not entitled to any priority over simple contract debts: *In re Turner* (3); *Kemp* v. *Waddingham* (4). Therefore, the Chief Clerk's certificate ought to be altered by putting *Bainbridge's* judgment debt on the same footing as the simple contract debts of the testator.

D. L. Alexander, for the administratrix.

(1) 26 Beav. 600.

(2) Sect. 3: "And whereas by an Act passed in the 4th and 5th years of their late Majesties King *William* and Queen *Mary*, intituled 'An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas, and Exchequer in *Westminster*,' it was enacted that no judgment, not docketed and entered in books in the manner thereby provided, should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators in the administration of their ancestors', testators', or intestates' estates. And whereas by several later Acts judgments are required to be registered with more particulars than were required by the said recited Act, and it is thereby enacted that judgments not so registered shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until the same shall be registered in manner thereby required, and, in obedience to a direction in one of the same Acts contained, the dockets existing under the said first-recited Act have been finally closed. And whereas the said several later Acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates, in consequence whereof such heirs, executors, or administrators have been held to have lost the protection which they enjoyed under the said first-recited Act, and it is expedient that the same should be restored; Be it therefore declared and enacted that no judgment which has not already been, or which shall not hereafter be, entered or docketed under the several Acts now in force, and which passed subsequently to the said Act of the 4th and 5th years of King *William* and Queen *Mary*, so as to bind lands, tenements, or hereditaments as against purchasers, mortgagees, or creditors, shall have any preference against heirs, executors, or administrators in their administration of their ancestors', testators', or intestates' estates."

(3) 12 W. R. 337.

(4) Law Rep. 1 Q. B. 355.

FRY, J.

1882

VAN GHELUVE v. NERINCKX.

Cookson, Q.C., and *Procter*, for *Bainbridge*:—

The Act 23 & 24 Vict. c. 38, was intended only for the protection of executors and administrators against an action for a *devastavit* by an unregistered judgment creditor if they did not pay him in priority. It was intended simply to meet the decision in *Fuller* v. *Redman* (1). That this is the true view is shewn by *Kemp* v. *Waddingham* (2), which was an action for a *devastavit*. *In re Turner* (3) is the only case since the Act which goes further, and in *Steel* v. *Rorke* (4), on which Vice-Chancellor *Wood* relied in deciding *In re Turner*, the decision was only that an executor could not plead an unregistered judgment as a defence to an action by a simple contract creditor of the testator. *Landon* v. *Ferguson* (5) was a decision on the Act of Wm. & M., and it only professed to follow *Steel* v. *Rorke*. At any rate the judgment debt carries interest from the date of the judgment though it be not registered.

Everitt, in reply.

FRY, J., after stating the facts, continued:—

The question turns upon sect. 3 of the Act 23 & 24 Vict. c. 38. The first question is, what is the meaning of the statute of *William* and *Mary* so far as it relates to the administration of the estate of a deceased person? The words appear to me not to admit of any reasonable doubt. Putting it shortly, they amount to this, that an undocketed judgment shall not have any preference against an executor in his administration of his testator's estate. What does that mean? It is said by Mr. *Cookson* that it means simply this, that, although the executor may have paid a simple contract creditor whilst there exists an undocketed judgment, he shall not be liable to the judgment-creditor for a *devastavit*. But that is not what the Act says. It says that the judgment "shall not have any preference in the administration of the estate." Those words, to my mind, convey a very simple meaning, viz., that the person who has the undocketed judgment shall come in

(1) 26 Beav. 600. (3) 12 W. R. 337.
(2) Law Rep. 1 Q. B. 355. (4) 1 B. & P. 307.
(5) 3 Russ. 349.

pari passu with the simple contract creditors, and shall not have any priority or preference in the administration of the estate, shall not have a better right than the ordinary simple contract creditors. From that it follows that the executor, who pays the simple contract creditor, is not liable for a *devastavit*, and for this simple reason, that the debts are put *pari passu*, and therefore the payment of the one with the knowledge of the other is no *devastavit*. That is the simple meaning of the words of the Act, as I read them.

But, if authority were required to shew that that is the meaning, there is the case of *Landon* v. *Ferguson* (1), which arose on the administration of an estate, and not on a *devastavit*, and the Court said that the judgment gave no preference or priority, but that the person obtaining it was placed in the position of a simple contract creditor. It is unnecessary to refer to other cases, for in all of them the same conclusion was arrived at. I read the language of Mr. Justice *Buller* in *Steel* v. *Rorke* (2) as expressing the same view, which was also expressed by Lord Chancellor *Hatherley*, when Vice-Chancellor *Wood*, in *In re Turner* (3). So much for the meaning of the Act of *William* and *Mary*.

Then comes the recital in the Act 23 & 24 Vict. c. 38, that it is expedient to restore the protection which heirs, executors, and administrators had previously had. What was the protection which they had previously had? It arose from the fact of all these debts being placed on the same level, and the most natural way of restoring the protection is to restore the debts to their equality. Well, what does the Act say? It says (to read it shortly) that an unregistered judgment shall not have any preference against executors in the administration of their testators' estates. It does not say what is the protection which is to be restored, it does not say merely that a *devastavit* shall not lie, but it says exactly what the statute of *William* and *Mary* had said, that there is to be no priority, and with the cessation of the priority the possibility of bringing a *devastavit* against the executor also ceases. The protection is therefore restored by restoring the equality of the debts. That is, in my judgment, the simple meaning of the Act, and accordingly I hold that the Chief

(1) 3 Russ. 349. (2) 1 B. & P. 307.
(3) 12 W. R. 337.

FRY, J.
1882
VAN GHELUVE v. NERINCKX.

Clerk's certificate was in error in finding that the unregistered judgment of Mr. *Bainbridge* was entitled to priority. [His Lordship then expressed his opinion that under the circumstances the applicant had not lost her right to question the priority of *Bainbridge* by delay, and added:—]

The certificate must be corrected accordingly, but, as Mr. *Cookson* has pointed out, it must stand for the amount of the judgment, and it will carry interest in the usual way from the date of the judgment. Considering the circumstances, I do not think I ought to visit Mr. *Bainbridge* with any costs, and I shall make no order as to costs, except that the costs of the creditor and of the administratrix are to be costs in the action. Mr. *Bainbridge* will add his costs to his debt.

Solicitors: *W. W. Gabriel; Cole & Jackson; Keighley, Shea, & Bevan.*

W. L. C.

FRY, J.
1882
June 28.

WOLFE *v.* MATTHEWS.

[1881 W. 2489.]

Trade Union—Contract—Direct Enforcement—Trade Unions Act, 1871 (34 & 35 *Vict. c.* 31), *ss.* 2, 3, 4.

By the *Trade Unions Act*, 1871, s. 4, it is provided that nothing in the Act shall enable the Court to entertain any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to its members.

The Plaintiffs, members of a trade union within the Act, sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members:—

Held, that such an injunction would not be a direct enforcement of the alleged agreement and that the Court might entertain the proceeding.

THE Plaintiffs in this action sued on behalf of themselves and all others the members of the *London West End Farriers Trade Society*, except the Defendants, to restrain the Defendants from applying any part of the funds of the *Society* in carrying out an amalgamation of the *Society* with the *Permanent Amalgamated Farriers Protection Society*.

The *London West End Farriers Trade Society* was a combination associated together for purposes some of which were admitted to be in restraint of trade.

An amalgamation of the *Society* with the *Permanent Society* had been proposed in 1880 on certain terms, to which the Plaintiffs did not agree.

The Plaintiffs pleaded that the Defendants intended, unless restrained by injunction, to pay money out of the funds of the *Society* to the *Permanent Society*, and that the Plaintiffs as members of the *Society* were entitled to receive out of the funds of the *Society* certain payments and other benefits as provided by the rules of the *Society*.

The main defence to the action was, that the amalgamation was complete, having been consented to by more than two-thirds of the members under sect. 12 of the *Trade Unions Act Amendment Act*, 1876, but a preliminary objection was taken that the action was an attempt to enforce an agreement for the application of the funds of this trade union to provide benefits to members, which was an agreement not enforceable under the enabling *Trade Unions Act of* 1871 (34 & 35 Vict. c. 31).

The *Society* was not registered under the Act of 1871.

Cozens-Hardy, Q.C., and *E. T. Holland*, for the Plaintiffs.

Levett, for the Defendants, took the preliminary objection of want of jurisdiction:—

The Plaintiffs are not entitled to maintain this action. The Act of 1871 gives the society a right to property, but not to enforce an agreement of this nature: *Rigby* v. *Connol* (1). It was there decided that the Act of 1871 did not make legal the contracts entered into by the members of such societies as this with one another. The *Society* not having been registered cannot maintain the action, *à fortiori* individual members of it cannot do so.

Bunting, for the trustees of the *Association*.

FRY, J.:—

This preliminary objection must be overruled. The Plaintiffs are members of a combination associated together for purposes

(1) 14 Ch. D. 482.

FRY, J.
1882
WOLFE
v.
MATTHEWS.

which are in restraint of trade, and this combination or association would undoubtedly have been unlawful but for the provisions of the statute 34 & 35 Vict. c. 31, of which the sole or principal object seems to have been to place restrictions on the officers of the societies and to prevent their defalcations. The 2nd and 3rd sections of the Act provide that "the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member liable to criminal prosecution, or so as to render void or voidable any agreement or trust." Then the 4th section provides that "nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of certain agreements, and, amongst others, any agreement for the application of the funds to provide benefits to members."

Then I must look to see what is the nature of this application. The Plaintiffs say that having contributed to the common funds of this association they are entitled to the benefits which it was contracted they should have in return for such contributions; and they also claim these same benefits on behalf of other members of the *Association;* and on the ground that an inconsistent application of the funds is about to be made by the Defendants to some other persons, not according to the rules of the *Association*, they ask for an injunction to restrain such improper application.

Now it is plain that this is not an action to recover damages for the breach of an agreement, neither is it, in my judgment, an action to directly enforce an agreement, which proceedings are alone mentioned in the 4th section. An order that the Defendants should pay money to the Plaintiffs would be a direct enforcement of an agreement for the application of the funds, but all that is sought here is to prevent the payment of the moneys to somebody else. Either that is no enforcement of an agreement at all, or it is an indirect enforcement. To take a simple case, if there is a contract by *A.* to pay £100 to *B.*, that contract is directly enforced by a judgment of the Court directing *A.* to pay to *B.* And the contract is only indirectly enforced or not at all by a judgment restraining *A.* from paying the money to some one else. It is only by a stretch of language that such an order can be said to

enforce *A.'s* contract; the utmost that can be said is, that it is then more likely that *A.* will pay to *B.* For these reasons I am of opinion that the judgment of the Master of the Rolls in *Rigby* v. *Connol* (1) does not apply to this case, and that the preliminary objection must be overruled, though it will remain to be seen whether the terms of the Act will eventually permit any relief to be given by the Court to the Plaintiffs.

Solicitors for Plaintiffs: *Shaen & Co.*
Solicitor for Defendants: *Louis Lewis.*

(1) 14 Ch. D. 482.

C. W. C.

KAY, J.

1882

May 8.

PILLER *v.* ROBERTS.

[1880 P. 1509.]

Practice—Third Party—Questions between Defendant and Third Party—Costs to be paid by Third Party—Rules of Court, 1875, *Order* XVI., *rr.* 17, 18, 19, 20, 21.

No questions can be determined between a Defendant and a third party brought into the action by the Defendant unless an order be obtained under Order XVI., rule 17, giving directions that such questions shall be determined.

The Court has power under Order XVI., rule 21, to order the third party so brought into the action to pay to the plaintiff the costs occasioned by his defence.

THE writs in these two actions against *Roberts*, which had been consolidated, were delivered in November, 1880, and January, 1881. The Plaintiff claimed two sums of £96 and £188 10*s.* as the balance due on contracts for building four houses in *Hornsey* and six houses in *Finchley*. The Defendant *Roberts* alleged that he had acted as agent of *Jonathan Pinfold*, for whom he had entered into the contracts, and by whom he claimed to be indemnified. He accordingly obtained leave to serve notice under Order XVI., rule 18, upon *Pinfold*, who thereupon entered an appearance and obtained leave to defend, and subsequently delivered a defence and counter-claim. The Defendant *Roberts* did not deny that the money was due, but he alleged the Plaintiff knew that he was acting as the agent of *Pinfold*, and upon this point evidence was taken before the Court.

Rigby, Q.C., and *Warmington*, for the Plaintiff.

Fillan, for the Defendant *Roberts*.

Higgins, Q.C., and *Yate Lee*, for *Pinfold*, admitted that as no order had been obtained under Order XVI., rule 19, for directions as to the mode of trial the question between *Pinfold* and *Roberts* could not now be tried, otherwise he should have contended that *Roberts* had lost his remedy by his own conduct. Under the circumstances they did not propose to proceed with the counter-

claim put in by *Pinfold*, but they asked for a declaration that *Pinfold* should not be bound by any decree made in this action.

KAY, J. :—

The question now turns upon the practice of the Court under Order XVI. The action is brought against *Roberts* alone by two persons named *Piller*, who say they agreed with *Roberts* to build four houses at *Hornsey* and six houses at *Finchley*. They have erected the houses and have received the greater portion of the money agreed upon, but they claim a balance of £96 in one case and £188 10*s*. in the other. *Roberts* then alleges that he is entitled to be indemnified by *Pinfold*, and he applied to the Court for leave to serve notice on *Pinfold*. Accordingly, *Pinfold* was served with the notice of that claim for indemnity. That was a proceeding taken under the 18th rule of Order XVI., which provides that the notice is to state the ground of the claim. The notice was properly served, and after *Pinfold* had received it he applied to the Court and obtained an order for leave to defend, and he afterwards put in a statement of defence and counter-claim.

It seems that under the 17th rule of Order XVI. another course might have been taken. If the notice had been served under rule 17 then the Court could have made an order to have the question decided between *Roberts* and *Pinfold*, such as was made in *Marner* v. *Bright* (1); but that was not done, and no question can now be tried between those parties; but I am told by the Plaintiff that he asks no relief against *Pinfold*, and only seeks a decree against *Roberts*; so, therefore, if the Court is in a position to give judgment against *Roberts* the whole case is at an end.

That depends upon a question of fact as to which there has been much conflicting evidence; but I am of opinion that the Defendant has failed to establish his case, and there must be an order against *Roberts* that he pay the demand made by the claim, and he must also pay the costs of the action.

Rigby, Q.C., then asked to have the costs occasioned by the intervention of the third party. The Defendant *Roberts* admitted that the money was due, and but for the denial of the claim by the third party judgment would have been signed.

(1) 11 Ch. D. 394, n.

KAY, J.
1882
PILLER
v.
ROBERTS.

Higgins, Q.C., submitted, upon the question of costs, that the Court had no jurisdiction under the provisions of Order XVI., rule 21, to impose any terms with regard to the payment of costs by a party brought in by notice under rule 18. That was the effect of the decision in the *Yorkshire Waggon Company* v. *Newport and Abercarne Coal Company* (1), where Mr. Justice *Lush* said there was nothing expressly said about costs in the 21st rule of Order XVI.; and if there was any power with regard to costs it must be under the words "on such terms as shall seem just." There were no terms as to costs expressed in the order allowing the third party to defend, and Chief Justice *Cockburn* was of opinion that payment of costs was not intended to be provided for by the rules.

Rigby, Q.C., in reply, cited *Hornby* v. *Cardwell* (2), where it was held that the High Court has jurisdiction to order a third party to pay costs: *MacAllister* v. *Bishop of Rochester* (3), and submitted that the words, "on such terms as shall seem just," meant that the Court might make any order, including payment of costs, as it should think fit, and if the Defendant succeeded then the Court might order that he should receive costs. The Plaintiff, therefore, ought to have the costs occasioned by the intervention of the third party.

KAY, J.:—

If the point had not been decided in the case of *Hornby* v. *Cardwell* I should still have come to the conclusion that the Court had power to order the third party to pay costs.

It appears that on the application of *Pinfold* an order was made that he should be at liberty to defend this action, and to put in a counter-claim. In pursuance of this order, *Pinfold* put in a defence and counter-claim. It is now urged that the order ought to have imposed on *Pinfold*, under rule 21 of Order XVI., that he should be liable to the costs of action if the Court thought it right to order him to pay costs. The only question, therefore, is, whether it is necessary, in order to subject him to costs, that the order should express that liability. But, in my opinion, that goes

(1) 5 Q. B. D. 268.
(2) 8 Q. B. D. 329.
(3) 5 C. P. D. 194.

too far, because if that were required, then it should go on to provide that he should be subject to the judgment of the Court upon his case in other respects.

If the Court gives him leave at his own request to come in, it could only be upon the terms that he should be liable to any judgment which the Court should think fit to make against him. Surely it is equally necessary that he should be liable to pay costs if the Court thinks fit to award costs against him. It was always the practice in the Chancery Division that a creditor who came in under an administration decree was liable to an order for payment of costs, so also in winding-up cases claimants have been allowed to come in, but if they chose to do so it was always subject to an implied submission to pay costs if they did not succeed. The third party necessarily puts himself in the position of a defendant both in respect of relief from and liability to costs. There is no case to the contrary, but in support of this view there are the cases of *MacAllister* v. *Bishop of Rochester* (1) and *Hornby* v. *Cardwell* (2). In the latter Lord Justice *Cotton* says (3): "The rules of Order XVI. are based upon sect. 24, sub-sect. 3 of the Act of 1873, and their combined effect is that a third party, when joined as such, becomes a party to the cause with all the liabilities of a party, and one of these liabilities is the liability to pay costs under Order LV." It seems to be a direct decision that the Court has under such circumstances power to order a third party who comes in and obtains leave to defend to pay the costs of action when the decision is against him. Here the Defendant not only got leave to defend but to put in a counter-claim. I think the order giving leave to defend need not express that he must be liable to any order for costs, because that is implied. He has thought fit not to open his counter-claim. That I dismiss with costs to be paid by *Pinfold*.

Solicitors: *Savidge & Steward; Henry Wickens; Routh, Stacey, & Castle.*

(1) 5 C. P. D. 194. (2) 8 Q. B. D. 329.
(3) 8 Q. B. D. 338.

T. W. G.

CHITTY, J.

1882

March 31;
May 13.

McHENRY *v.* LEWIS.

[1881 N. 2327.]

Practice—Stay of Proceedings—Two Actions in this Country—Lis alibi pendens—Actions in rem—Actions in personam.

23 Ch D 226

Where the actions are *in personam* it is no ground for staying proceedings in an action in this country that there is another action pending in this country, and also an action in a foreign country, the former partly and the latter wholly relating to the same subject matter.

Cox v. *Mitchell* (1) followed.

The Mali Ivo (2), *The Catterina Chiazzare* (3), and *The Delta* (4) considered and distinguished.

Affirmed on appeal 22 Ch D 370 a

THIS was a motion on behalf of the Defendants that all further proceedings in the action, which was an action by *McHenry* on behalf of himself and all holders of certificates for bonds and shares under the *Atlantic and Great Western Railroad Company* Reorganization Scheme, other than the Defendants, might be stayed.

The facts and the arguments are sufficiently stated in the judgment.

Romer, Q.C., and *Hatfield Green*, in support of the motion.

Ince, Q.C., and *H. B. Buckley*, for the Plaintiffs.

The following authorities were cited or referred to: *Watson* v. *Cave* (No. 1) (5); *Gellatly* v. *Commissioners of Sewers of the City of London* (6); *Castro* v. *Murray* (7); *Dawkins* v. *Prince Edward of Saxe-Weimar* (8); *Dryden* v. *Foster* (9); *The Mali Ivo*; *The Catterina Chiazzare*; *The Delta*; *Lord Dillon* v. *Alvares* (10); *Cox* v. *Mitchell*; *Wilson* v. *Ferrand* (11); *Ostell* v. *Lepage* (12);

(1) 7 C. B. (N.S.) 55; 29 L. J. (C.P.) 33. 6 Jur N S 225
(2) Law Rep. 2 A. & E. 356.
(3) 1 P. D. 368.
(4) 1 P. D. 393.
(5) 17 Ch. D. 19.
(6) 3 Ch. D. 610.
(7) Law Rep. 10 Ex. 213.
(8) 1 Q. B. D. 499.
(9) 6 Beav. 146.
(10) 4 Ves. 357.
(11) Law Rep. 13 Eq. 362.
(12) 5 De G. & Sm. 95.

On app. (1); *Huggins* v. *York Buildings Company* (2): *Pickford* v. *Hunter* (3); *Seton* (4).

Cur. adv. vult.

May 13. CHITTY, J.:—

This is a motion in the action of *McHenry* v. *Lewis* by the Defendants asking for the stay of all further proceedings in the action.

The object of the action, which was commenced in July, 1881, is in substance to render the Defendants, who are the trustees of a reconstruction scheme relating to the affairs of an American railway company called the *Atlantic and Great Western Railroad Company*, liable for numerous breaches of trust, first with reference to an assessment fund, and secondly with reference to the reconstruction scheme itself.

In 1879 an action was commenced by one of the Messrs. *Conybeare* against the same trustees in *England*, and the object of that action is to a considerable extent identical with the action in which this motion is made. But in many respects this action, which I will call *McHenry's* English action, is wider and more comprehensive in its scope, it is founded upon rights which *McHenry* possesses or alleges that he is entitled to and which Mr. *Conybeare* could not enforce in the other English action. It is not necessary to go through the two claims at any length, it is sufficient to say that the scope of *McHenry's* English action is much wider than the scope of *Conybeare's* action. The difference does not consist merely in pleader's allegations varying the same facts, but the distinction is essential.

In August, 1881, after *McHenry's* English action had been commenced, an action was commenced in *America* by another Mr. *Conybeare* and Mr. *McHenry* as co-plaintiffs on behalf of themselves and others (I need not give the whole title of the action) for purposes which are substantially, as I gather, the same as those which are sought in *McHenry's* English action; but there are in the American action additional Defendants, namely the new com-

(1) 2 D. M. & G. 892.
(2) 2 Atk. 44.
(3) 5 Sim. 122.
(4) Page 290.

CHITTY, J.
1882
McHENRY
v.
LEWIS.

pany which has been incorporated under the American law and its directors.

The state of these actions is that judgment has not been obtained in any one of them. An order has been made in Mr. *Conybeare's* English action to ascertain the amount of remuneration which ought to be paid to the trustees, and it is apparently one of the objects of *McHenry's* English action to supersede that order if it can be done.

A motion was made in *McHenry's* action for an injunction, which failed by reason of the American company not being parties to the action. Now it is obvious from what I have stated that the motion is to stay *McHenry's* action, and is not a motion to put the Plaintiff to his election, which could not be made because the Plaintiffs in the other action are not parties to this motion.

The motion which I am dealing with came first before Mr. Justice *Kay*, and he allowed it to stand over for the purpose of giving the Defendants, the moving parties, an opportunity if they thought fit of moving to consolidate, but that liberty has not been acted upon, a liberty which would have put the Defendants, if they had thought fit to avail themselves of it, in the position in which the parties were in the well-known case of *Amos* v. *Chadwick* (1), where a consolidation order was made, or, what is perhaps the same thing in other words, one out of numerous actions was selected as a test action.

Then the Defendants feeling the difficulty they were in offered at the Bar certain undertakings which are in substance these, not to raise any objection to the jurisdiction of the American Court or to the right of that Court to decide any question which might have been decided here in the action of *McHenry* v. *Lewis*, and they proposed to undertake to be bound by the judgment in the American action on the matters raised in that action not included in the action of *Conybeare* v. *Lewis*, as if it were a judgment made in the action of *McHenry* v. *Lewis*. They also stated at the Bar that the stay of proceedings which they sought for was not to be an absolute one but only until further order, with liberty to the Plaintiffs at any time to apply.

(1) 4 Ch. D. 869; 9 Ch. D. 459.

The substance of these undertakings appears to be in effect not to interfere in any way with the proceedings of Mr. *Conybeare* in his English action, but rather to single out the American action as a test action, and not put the Plaintiffs to any election; but the Defendants themselves proposed to select the foreign action as the one which is to be the test action and to decide the matters which are in issue between the parties in the English action.

Now the grounds upon which the motion was rested were these. It was said that the Court has an inherent jurisdiction to stay frivolous and vexatious proceedings, and in support of that proposition two cases of *Castro* v. *Murray* (1) and *Dawkins* v. *Prince Edward of Saxe-Weimar* (2), were referred to. In both these actions it was quite plain that the Plaintiff's demand was vexatious and frivolous. In the former case the action was brought against the clerk of the petty bag for declining to seal a writ, and it was plain and obvious to the Court that there was no such duty imposed upon him. In the latter case the Plaintiff was suing (as the Court said) in a merely frivolous and vexatious action the members of a Court of inquiry with reference to a claim which had been already disposed of in the House of Lords in an action in which Colonel *Dawkins* was also Plaintiff. There is, however, a passage in Lord *Blackburn's* judgment in *Dawkins* v. *Prince Edward of Saxe-Weimar* to the effect that though the jurisdiction does exist it is one which ought to be exercised very carefully.

It is obvious that the case which is presented by the Defendants in this motion cannot be rested on the principle of those cases. This action is not a frivolous or vexatious one. The pleadings state (whether founded on fact or not is quite another thing) a case which requires a defence, and which the Court would not off-hand on a motion say is either frivolous or vexatious.

Then the Defendants refer to the cases of *The Mali Ivo* (3), *The Catterina Chiazzare* (4), and *The Delta* (5). From these cases it will be found that the proposition the Defendants relied on was a *dictum* of Sir *Robert Phillimore's*, before whom all these cases came. But these actions were actions *in rem*, and there were

(1) Law Rep. 10 Ex. 213.
(2) 1 Q. B. D. 499.
(3) Law Rep. 2 A. & E. 356.
(4) 1 P. D. 368.
(5) 1 P. D. 393.

CHITTY, J. 1882 McHENRY v. LEWIS.

proceedings *in rem* in a foreign country. And the proposition on the part of Sir *Robert Phillimore*, though he did not act upon it in any of the cases, was not simply that the Court would stay proceedings, but that there would be a case upon which to put the Plaintiffs to their election. I think, as far as I am concerned, these observations of his may be disposed of by the remark that the actions were actions *in rem*, and obviously it would be inconvenient to have two Courts deciding finally and conclusively as is the case when the proceedings are *in rem* with reference to the same subject-matter.

The Defendants also referred to the well-known practice in the Court of Equity with regard to staying creditors' actions. The answer is obvious, that a creditor's action never was stayed till after decree.

On the part of the Plaintiffs, the case of *Cox* v. *Mitchell* (1) was referred to, in which the Court of Common Pleas held that the motion to stay where the action was *in personam* on the ground of an action in a foreign country, was, in fact, a mere experiment for which there was no authority, and they refused the motion; and there the Court made an observation which particularly applies to this case, namely, that there is a great difficulty in the way of Plaintiffs who have to sue Defendants some of whom are in one country and some in another. The Court there decided that both actions ought to be allowed to proceed.

Other authorities were referred to, such as *Lord Dillon* v. *Alvares* (2), where there was a plea of *lis alibi pendens*, there being an action in *England* and also one in *Ireland* relating to the same subject-matter. The judgment is very short. The plea failed, and the Lord Chancellor said he could not stay the suit where the person sued had an estate in *England* and in *Ireland*. There was real estate in *Ireland* in that case which was affected by the securities. The phrase "estate," as far as it related to *England*, must have referred to personal estate which the party had in this country, because there was no real estate here which was sought to be affected. That, no doubt, was on a plea, but it does shew that the plea would not succeed.

Another case referred to on the part of the Plaintiffs was

(1) 7 C. B. (N.S.) 55; 29 L. J. (C.P.) 33. (2) 4 Ves. 357.

Wilson v. *Ferrand* (1), where Vice-Chancellor *Malins* refused to stay further proceedings in the action, notwithstanding there was an action pending in a foreign Court against one and one only of the Defendants who were Defendants in the English action.

It seems to me that in these circumstances I must follow the principle which is laid down by the Court of Common Pleas in *Cox* v. *Mitchell* (2), and which is to a certain extent supported by the other two cases I have mentioned, and that I must refuse this motion.

I ought perhaps to say this, which I have not touched upon yet, that these representative suits are a mode of procedure which was adopted by the old Court of Chancery with the view to prevent injustice, on the ground that it was impracticable to bring such suits to a conclusion if it were necessary to make all persons parties. That is a procedure which has been thought so convenient that it has been adopted now by the High Court since the Judicature Act. As Lord Justice *James* said in the case of *Watson* v. *Cave* (No. 1) (3), these suits are always accompanied by some difficulty, and as Lord Justice *Cotton* observed in the same case, representative suits are difficult of management; and I do not propose in deciding this case in any way to say that if there were several representative suits by several Plaintiffs, the Court would allow them all to proceed.

It seems to me that it would be within the principle of vexatious litigation, if (to put a large number) a dozen representative suits were allowed to proceed against the same Defendants, but then no doubt the proper mode of dealing with such vexatious proceedings would be by making a proper application, as was done in *Amos* v. *Chadwick* (4), or some similar application to that.

No doubt one of the objects (as is plain from the statement of claim) of *McHenry's* English action is to supersede an order which has already been made in *Conybeare's* English action with reference to the remuneration of the trustees. That really is not before me now. Of course it may be a matter for consideration hereafter, if the question arises, how far Mr. *McHenry* may not be

(1) Law Rep. 13 Eq. 362.
(2) 7 C. B. (N.S.) 55; 29 L. J. (C.P.) 33.
(3) 17 Ch. D. 19.
(4) 4 Ch. D. 869; 9 Ch. D. 459.

CHITTY, J. 1882 McHENRY v. LEWIS.

bound by the order that has been obtained in the action in which he is represented, provided that the order was fairly made. I mean to leave that question entirely and absolutely open, and in no way to prejudice it.

I have in my mind the well-known action of *Gellatly* v. *The Commissioners of Sewers of the City of London* (1), in which the Master of the Rolls held that *Gellatly* was bound by the decree in the great *Epping Forest* case, where the proceedings no doubt had been fairly conducted, and the decree fairly obtained.

That really disposes of the motion, but there was another point which was somewhat faintly urged as a second ground. It was said that the Plaintiff *McHenry* was not the holder of the bonds, and that therefore he could not proceed. The property in the bonds or certificates in respect of which the action is brought is still vested in him. It has not been divested by the liquidation proceedings under which the receiver has been appointed, and the objection is one which would not go to a stay of proceedings; but rather it would be a ground of defence, if it is a defence. I do not suggest that it is. That would be the proper mode of dealing with it, or perhaps it would be ground for saying that the receiver who has the actual custody of the bonds ought to be made a party. The bonds are, according to the evidence, ready to be produced at any moment by the receiver, and it seems to me that ground is one upon which the motion cannot be supported.

The only question that remains is that of costs. Mr. *Lewis* and his co-trustees are being sued in three different actions, one in America, and two here; and I am not in any degree surprised that he should have made this motion. It may be that in the result it will be found that these proceedings are vexatious as against him. I think at least he had such a foundation for making this motion that I ought to depart in this case from the general rule. I shall not make him pay the costs of the motion, but shall make the costs costs in the action.

Solicitors: *Trinders & Curtis-Hayward; Hores & Pattisson.*

(1) 3 Ch. D. 610.

G. M.

In re CAPITAL FIRE INSURANCE ASSOCIATION.

CHITTY, J.

1882

July 11, 12.

Company—Winding-up—Business of the Company at Home and Abroad—Commencing Business—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 2 [*Revised Ed. Statutes. vol. xiv. p.* 220].

When a company is incorporated to carry on business in the *United Kingdom* and in other parts of the world, and it has commenced to carry on its business in a foreign country, and there appears a *bonâ fide* intention to commence business in this country, the mere fact that it has not actually commenced in this country the objects for which it was incorporated within a year from its incorporation is not a sufficient ground for ordering the company to be wound up under the *Companies Act*, 1862, s. 79, sub-s. 2.

Princess of Reuss v. *Bos* (1) discussed and distinguished.

THIS was a shareholder's petition to wind up the above company on the ground that it had not commenced business in *England* within a year from its incorporation within the meaning of sub-sect. 2 of sect. 79 of the *Companies Act*, 1862.

The company was incorporated on the 12th of January, 1881, with a capital of £2,000,000, in 200,000 shares of £10 each. The objects of the company as stated in the memorandum of association were to carry on fire insurance business in the *United Kingdom* and its dependencies and in other parts of the world.

The articles of association provided that the head office of the company should always be in *London* or *Westminster;* that the directors should at any time on the requisition in writing of twenty members holding not less than one-fifth of the total share capital convene an extraordinary or special general meeting; that the directors should never be less than eight nor more than twenty, of whom one-half were to be French and one-half English; that the directors were to have the entire management or superintendence over the affairs of the company; that they should commence business as soon as an adequate proportion of the share capital was in their judgment subscribed for; and they were to carry out generally the objects of the company as defined by the memorandum in such manner and to such extent as they might from time to time deem necessary for the benefit of

(1) Law Rep. 5 H. L. 176.

CHITTY, J. 1882 *In re* CAPITAL FIRE INSURANCE ASSOCIATION.

the company, and it was further provided that the directors might at any time delegate any of their powers to a committee or committees to act either in the *United Kingdom* or abroad.

There were 338 shareholders, holding over 30,000 shares, of these a large majority were French holders, only 2470 shares being held by English shareholders.

The head office of the company was in *London*, where there were a secretary, manager, and clerks, but with the exception of two general meetings held in May and June, 1881, and the ordinary meetings of directors no business had been transacted in *England*.

In accordance with the provisions contained in the articles certain French gentlemen had been appointed directors, and a branch establishment had been opened in *Paris* where a considerable business had been done, premiums to the amount of £40,000 having been paid.

Ince, Q.C., and *Whitaker*, in support of the petition:—

The company has not commenced to carry on business in this country within a year from its incorporation within the meaning of sect. 79 of the *Companies Act*, 1862. It is virtually a French company. *Princess of Reuss* v. *Bos* (1) governs this case. In that case both Lord *Cairns* and Lord *Hatherley* in their speeches, although not directly deciding the point, expressed themselves to the effect that the fact of not commencing business in *England* within the year was within the spirit of the section and ordered the company in question to be wound up under the 5th sub-section of the 79th section, being the "just and equitable" clause.

Whitehorne, Q.C., and *S. Brice*, supported the petition on behalf of the creditors and one shareholder holding twenty shares.

Crossley, Q.C., and *Terrell*, supported the petition on behalf of a shareholder holding 500 shares.

Oswald appeared for another shareholder holding 300 shares and supported the petition.

(1) Law Rep. 5 H. L. 176.

Methold appeared for some of the original directors, but took no part in the argument.

Romer, Q.C., and *Beddall*, for the company:—

No case whatever is shewn for a winding-up order. The petition is only supported by four shareholders, including the Petitioner, holding in the aggregate 870 shares out of 2470 shares held by English shareholders. There are altogether over 30,000 shares held by 338 shareholders. The company is carrying on an extensive business in *Paris*, having already received £40,000 in premiums. It is sworn to, and not denied, that the company intend to take risks and issue policies in *England* as soon as a sufficient amount of capital is subscribed. In *Princess of Reuss* v. *Bos* (1) there was no evidence that any business at all had been carried on, and it was not pretended that any would be carried on, in *England;* so that case has no application at all to the present one.

Ince, in reply:—

The company has not only not commenced business in this country, but has actually declined taking risks when offered. We submit that *Princess of Reuss* v. *Bos* ought to govern this case.

CHITTY, J.:—

This is a petition to wind up a fire insurance company which originally started under the name of the *Universe Fire Insurance Association*, but afterwards changed its name to the *Capital Fire Insurance Association*. The petition is presented by a shareholder who holds fifty shares, and I do not think that any word can be uttered against the *bona fides* of the Petitioner. He, as I say, holds fifty shares, and there appear at the bar to support the petition three other shareholders, holding among them rather more than 800 shares altogether. The petition is supported by 870 shares. The total number of shares issued is 30,293, which are held by 338 different shareholders, and it is said, and I believe rightly said, that of the shareholders the large majority

(1) Law Rep. 5 H. L. 176.

CHITTY, J. 1882 *In re* CAPITAL FIRE INSURANCE ASSOCIATION.

are French shareholders, and that the number of shares held in *England* by Englishmen, as I understand it, amounts altogether to 2470.

The first question which I have to consider is what is the attitude towards the Petitioner of the shareholders who do not appear. Of the 338 there are but four who appear here in support. On cross-examination Mr. *Wright* said that there were other shareholders, whom he named, who supported him, whose shares amount together, including his own and those held by his father, to 800, and he says—but it is a loose statement, and of course necessarily a loose statement made by a gentleman in his position—that he believes he has one-half of the English shareholders supporting him. But I consider for the purposes of this petition that the shareholders who do not come forward must be treated in any view as neutral. Well then, is it fair to treat them even as neutral? If I did not treat them as allowing their case to be put forward by the company which is resisting the order, I should be holding that which would lead greatly to the increase of the cost of these winding-up petitions, which assuredly are sufficiently great as matters now stand, and I think it is a fair inference, particularly in the circumstances of this case, to say that the other shareholders do not wish for a winding-up. The result therefore is this, that the wishes of the shareholders, if I am right in what I have said, by a very large majority are adverse to the Petitioner's case.

Now the point and the sole point upon which the Petitioner relies is, that the company has not commenced its business within a year from its incorporation within the meaning of the 79th section of the *Companies Act* of 1862; that is the question which I have now to consider. By the memorandum of association, the objects of the company are stated to be the carrying on "in the *United Kingdom* and its dependencies and in other parts of the world the business of insurers or assurers of buildings, furniture, and other chattels, and all insurable objects on land or afloat against fire," and the second is to purchase lands, buildings, and other hereditaments and properties, interests and securities, real and personal at home or abroad.

The articles, which are a contemporaneous document, and may

be read with a view to ascertain the meaning of the parties to the memorandum, that is to say, to explain the meaning more fully, provide by the 3rd article that "the head house or office of business of the company shall always be in London or Westminster, at such particular locality as the directors shall decide." By the 47th clause, which has a bearing on the question of the wishes of the contributories, it is provided "the directors may, whenever they think fit, and they shall upon a requisition in writing under the hands of no less than twenty registered members holding in the aggregate not less than one-fifth part of the actual share capital of the company, convene an extraordinary or special general meeting." The 52nd clause relates to meetings, requires the notices to be published in *London* and elsewhere; and the 69th clause provides that "the directors of the company shall be never less than eight in number nor more than twenty, and that one-half of the directors be French, and one-half English, or as nearly as possible." Then the 83rd section is material upon the question which I have to decide: "the board of directors shall have the entire management of and superintendence over the affairs and transactions of the company, they shall and may commence the business of the company as soon as an adequate proportion of the share capital of the company shall in their judgment have been subscribed for," and then, after mentioning the costs of establishing the company, the directors are required "to proceed to carry out generally the objects of the company as defined by the memorandum of association in such manner and to such extent"—here are important words—"as they may from time to time deem necessary for the benefit of the company." The 110th article provides that the directors "may from time to time delegate any of their powers except that of making calls to a committee or committees to act either in the *United Kingdom* or abroad, and to consist of such members of their body as they shall think fit, and any such committee shall in exercise of the powers so delegated conform to any regulations that may be imposed on them by the directors." The 111th article is to the effect that the directors may from time to time create and appoint, revoke, and reappoint such local board or committees consisting of or including persons not being directors of the com-

CHITTY, J. 1882 *In re* CAPITAL FIRE INSURANCE ASSOCIATION.

pany, to sit and act under the direction of the board of directors at any localities in the *United Kingdom* or elsewhere. The 154th clause is with regard to notices to holders of share warrants.

Now the question is, as I have said, whether the company has or has not commenced its business within a year of its incorporation. An argument was put forward by Mr. *Whitehorne*, who appeared for a shareholder supporting the petition, to this effect. He said the objects for which the company was established were to carry on in the *United Kingdom* and its dependencies and in other parts of the world the business of insurers, and therefore when the Court came to consider what were the objects of the company, inasmuch as the copulative 'and' is used and not the disjunctive 'or,' the business means the whole of those objects. That argument is wholly untenable, because it would obviously be an absurd thing to say that if this company were carrying on a large insurance business in the *United Kingdom*, but not in the dependencies, or not in the other parts of the world, it would not be carrying on substantially its business within the meaning of the memorandum and these articles, and I cannot so hold. If the argument was pressed to the extreme, it would be necessary for company to be carrying on business in other parts of the world besides the *United Kingdom*, and its dependencies, which according to this argument would mean all its dependencies. What the company has done is this. There were originally a body of English gentlemen named as directors of the company, and for some time they acted as directors here, but for reasons which it is not necessary to state they resigned in a body. The article with regard to the directors which I have read, which provides that one half of them be French, was an amendment of the article as it originally stood, the provision with regard to the half being French, and the half being English, being inserted in pursuance of a special resolution, which was afterwards come to; but these directors having resigned, other directors have been appointed in their place, and the present directors consist, according to the article, of four French gentlemen and four English gentlemen.

Now what has the company done? It has carried on no fire business in *England*, that is to say, in the present state of circum-

stances the directors have refrained from even preparing forms for policies for fire insurance here, and they have refrained from accepting any fire risks here, but in *France* there is a very different state of things. The company has received since its incorporation, which took place on the 12th of January, 1881, down to some day in March, no less than £40,000 in *France* from premiums paid in respect of fire policies. In other words, the company has carried on a large and extensive business abroad, but it has not carried on business in *England* except only to the extent and in the sense which I am now about to explain. There have been two general meetings of the company here. It is not quite clear from the articles—the point has not been raised one way or the other definitely, and I express no opinion upon it—as to whether the general meeting ought to be held here or not, but at any rate up to the present time there have been two general meetings, one on the 11th of May, and the other on the 22nd of June, that meeting of the 22nd of June being an adjourned meeting of the first annual meeting held on the 11th of May, and at these two meetings considerable discussion appears to have taken place. The Petitioner attended the first, but he did not attend the second. Then here there is an office, and according to the articles, it is the head house or office of business of the company. The directors as appears from the board meeting book which has been handed up to me, have from time to time, and so far as I have gathered from the book, met regularly, but they have not, as I have said before, accepted any fire insurance here. In that sense, and in that sense only, which is a very limited sense of the term, they have carried on business. I prefer to say that the result is this, that the head or principal seat of the administration appears to be in *England*, and I should not think for a moment of holding upon a question turning on the construction of the 2nd sub-section of sect. 79, that the mere meeting of the directors would constitute a carrying on of business within the meaning of that clause. The case seems to be fairly stated in this way, that the administration of the company's business abroad has to some, but some limited extent, been conducted here. It has been principally conducted abroad, and in *France*, but that is justified from the various articles which I have

CHITTY, J. 1882 *In re* CAPITAL FIRE INSURANCE ASSOCIATION.

read, saying that the directors have power to appoint, and to delegate their power to directors or even persons who are not directors abroad under the 110th and 111th articles which I have read.

Now if the case were free from all authority, what would be the right conclusion to come to? I think the right conclusion would be that the company has commenced its business within a year, having regard to the objects of the company as defined by the memorandum, and having regard particularly to the 83rd clause, under which the directors are empowered to carry out those objects "in such manner, and to such extent as they may from time to time deem necessary for the benefit of the company." I think that the right conclusion to come to, is that the company has commenced its business within the meaning of the statute, and within the meaning of the memorandum and articles of association, because the statute does not purport for a moment to define what the business of the company is. In order to ascertain that you have to look, as I have done, to the memorandum and articles of association.

There is one fact more—I think I ought to mention it to shew that I have not failed to notice it—it is said that the French directors have not remitted the moneys here and have not accounted here, and that the company has only been in existence for eighteen months. I gather that the French business did not start immediately after the incorporation of the company, but that some delay took place before it was really set on foot. The affidavits shew that a sum of about £5000 is all that has been expended by the company in payment of fire risks. No doubt some of the fire risks are still running, but there would be a considerable amount of profit coming to the shareholders out of the £40,000 premiums which I have already mentioned. The amount of such profit of course will not be ascertained until the fire risks have run off. It is said by the Petitioner, that the French directors decline to account. Well, the duty, of course, of the French directors is to retain the money in France in order to meet the fire insurances which may mature there, and it will be their duty when those insurances have run off and when, in other words, the profits are ascertained, to remit the moneys to this country.

Therefore it seems to me that the mere fact that the French directors have not remitted money here does not afford any material ground whatever in support of the petition.

In these circumstances it seems to me that the petition fails, but I will give one or two instances which occur to me by way of illustration of the conclusion which I have arrived at. There are many companies that have been incorporated under the Act of 1862 for the purpose of carrying on business abroad, and some for the purpose of carrying on business here and abroad, such as gas companies, water companies, and tramway companies. I will take a tramway company. If a company were incorporated for the purpose of working tramways abroad, say in *South America*, or, more particularly, in *Monte Video* or some such place as that, and they were carrying on a large business in *Monte Video*, the head quarters of the administration being here in *England*, the general meetings taking place here in *England*, and the directors meeting here in *England*, could it for one moment be suggested that the company had not commenced its business (I assume that it is a large business in *Monte Video* and that they are carrying it on at great profit), simply because it was not working any tramway in *England?* I say not. I say that of course bearing in mind the speeches to the House of Lords in the case of *Princess of Reuss* v. *Bos* (1), which I now proceed to consider. That is a remarkable case. The gist of the argument presented both in the Court below and in the House of Lords was, that the company ought never to have been incorporated at all, and that it was not within the scope of the *Companies Act* of 1862. When the speeches of the noble Lords who advised the House in that case are read through carefully, it will be seen that they treated this company, which they held to be incorporated, as a thing which ought to be put out of existence as soon as possible. The House of Lords did not decide the case simply on the ground that the company had not commenced to carry on business within the year. There are several passages, particularly in Lord *Cairns'* speech, which require perhaps a little critical examination; but even Lord *Cairns*, and certainly the other noble Lords who addressed the House, put the case on all the circumstances,

(1) Law Rep. 5 H. L. 176.

CHITTY, J. 1882 *In re* CAPITAL FIRE INSURANCE ASSOCIATION.

and said the company ought to be wound up under the just and equitable clause at the end of the 79th section.

It would be useless and tiresome for me to go through all the speeches of the noble Lords, and I am not sure that it is a good plan for one Judge, and particularly a Judge of first instance, to criticise minutely the language of the Judges of the Court of Appeal or the language of the speeches in the House of Lords. What I consider it my duty to do is to extract fairly, and as well as I can, the meaning and the substance of the speeches which were so delivered. Now Lord *Hatherley*, who was Lord Chancellor, states (1) that "the question as to its being just and equitable has reference of course to what is just and equitable in a judicial point of view, regard being had to all the circumstances of the case." Then he goes through all the circumstances of the case, and he mentions at p. 195 the fact that no business had been transacted here from the time of the formation, except in the sense of there being an office here, and some mere forms being gone through of certain books being kept which are prescribed to be kept in the office; but he finds that really in truth no substantial business has been done in this country. Then he goes on, "When we find the deed in the condition in which we find it here, and that all the shares have been taken in the manner in which they here appear to have been *de facto* taken, namely, a large majority by persons whose names do not appear on the register at all, the Court of Chancery may well say that this is a case in which, as the Lord Justice observed, great injustice would be done to the creditors of the concern, and to those who might be allowed hereafter to become creditors, by permitting a corporation to remain registered, and to remain as a corporate body, which is in the condition in which we find this company to be. Therefore on every ground, not only on the ground of business not having been carried on (which is one of the things specified in the Act) for the term of a year, but not having been sensibly carried on, in fact, at any time in this country, but also from the position in which these shares are now found, every argument against the propriety of the deed, if it fail to satisfy your Lordships that the company is not incorporated, is an argument of course for extinguishing that

(1) Law Rep. 5 H. L. 193.

thing which although it has been in form incorporated, has not been incorporated in such a manner as to be effective for any possible useful purpose for which the Act of Parliament conceded the right of incorporation." That, I think, justifies what I have stated already, that at any rate, so far as Lord *Hatherley* was concerned, he speaks of this company as a sort of miserable thing which had come into existence, which existence ought to be terminated as speedily as may be. There are other passages to the same effect in his speech. What he refers to with regard to the shares is this: There were two classes of shares in the company, one the nominative shares—which I understand means the registered shares—and the other shares to bearer, which at that time were not permitted by the Act of Parliament. Lord *Colonsay* in his speech (1) says, "I think it is difficult to look at its history, its mode of operation, and its whole career, without feeling a strong moral conviction that the objects in view in bringing this company into existence, and giving it the character and aspect of a British company, were somewhat of a sinister kind, though what they were we may not be able to discover." Then he passes on to observations of a similar kind. At the bottom of p. 198, he says: "The irregularities in its proceedings, and the extraordinary character which it has developed in the course of the operations which have been performed, appear to me to be no reasons at all against applying the law" (that is the law to wind up) "but on the contrary to be reasons for giving effect to it." It does not appear, I should say, from the statement of facts in the report of the case in the House of Lords, whether the company, which had been founded for the promotion of other companies in any country, had or had not carried on business elsewhere than in *England;* but a passage was read to me from one of the reports in the Court below and it did appear that they had done some business in foreign parts. Lord *Cairns*, after disposing of the question as to the incorporation of the company, says (2): "But then looking at what happened afterwards, what we find is this: we find that in point of fact the company never has traded in this country, and I think it is a very legitimate suspicion to entertain, looking at the matter by the light of subsequent events, that it was never

(1) Law Rep. 5 H. L. 198. (2) Law Rep. 5 H. L. 201.

CHITTY, J. 1882 *In re* CAPITAL FIRE INSURANCE ASSOCIATION.

intended to trade in this country." I stay there for a moment in order to make this observation with regard to the case before me. I think it was intended that this company should carry on fire business in *England*, subject of course to the discretionary power which the directors have under the 83rd clause. One of the directors who has not been cross-examined swears, and I think his testimony is entitled to credit, that it is intended to carry on business here, when circumstances are such, as in the opinion of the directors, will justify their commencing business here. Then Lord *Cairns* proceeds to say: "We find that this provision in the articles to which I have referred (which I have termed an irregularity) has been largely acted upon, and that great numbers of the shares in the company (the far larger proportion) are held by persons whose names have never been brought on the register; that is to say, the holders have not been brought upon the register; they are holders of shares payable to bearer, which have been dealt with as such, and a great proportion of what ought to have been the capital of the company, is, as I understand it, outstanding upon these particular shares." Then at p. 202, towards the bottom, come the passages upon which reliance has chiefly been placed by the counsel for the Petitioner. "Then the fifth is" (that is the 5th sub-section of sect. 79) 'whenever the Court is of opinion that it is just and equitable that the company should be wound up.' I do not stay to consider whether the second head literally and in terms meets the present case" (that is the clause as to commencing business), "that is to say, I do not stop to consider whether a company incorporated for trading in *England* and abroad, which does trade abroad, I will suppose, but does not trade in *England*, is a company which does not commence business within a year from its incorporation within the meaning of the second head." I understand Lord *Cairns* to be saying there that that is the question which he does not propose to decide, "But the second head appears to me to throw a very strong light upon the principles on which the Court should act in dealing with the company under the fifth head, for it is by no means unfair to say that it was intended to cover, at all events, cases *ejusdem generis* with those which are found in the former heads. Beyond all doubt it appears to me that this company has brought itself

entirely within the spirit of the second head, and within the words of the fifth. Having regard to what is the spirit of the second, whether you can assert of this company absolutely that it has not traded at all within twelve months, I do not know;"—again he will not decide that question,—"but I am quite sure it has not traded within the meaning of the Act of Parliament, for it has not traded in *England*." No doubt that passage, which is in this case but a *dictum*, does stand somewhat in the way of the conclusion which I have arrived at; but reading the whole judgment together, as I think I ought to do, I understand as the result that Lord *Cairns* does not decide the question whether where the business of the company can be legitimately carried on both abroad and in *England* and it carries on business abroad only, that is not a trading or carrying on business within the meaning of the Act. He goes on immediately to say: "And, moreover, wherever it is trading it is a company which is now going on, and dealing with those shares to which I have referred, the shares payable to bearer, in a manner entirely repugnant to the spirit of the Act of Parliament. Therefore it seems to me it is exactly one of those cases where, even if we had not the case of a creditor coming forward and alleging non-payment of his debt, it would, under the other powers of the section, be just and equitable that the company should be wound up, because it is a company not trading in this country" [he puts that therefore as one ground only], "and because" [which is another ground] "it is a company dealing with its shares in a manner calculated to mislead the public, and defeat the just rights of creditors, and therefore that it should be put an end to."

Desiring to ascertain truly and fairly the meaning of Lord *Cairns'* opinion on this subject, I think there that though he relies on the non-trading in this country, he does not rely on that as a ground distinct in itself, but he puts that in connection with the dealing with the shares in a manner calculated to mislead the public, and says, arguing from what may be called the fair spirit of the clause as to the commencement of business, the case is brought within the letter of the just and equitable clause of the 79th section. That is borne out by the next paragraph. I need not read it, but the substance of it is that he puts forward the

CHITTY, J. 1882 *In re* CAPITAL FIRE INSURANCE ASSOCIATION.

whole of that case as the case upon which it would be fit for the Court to wind up the company, and then at the end of his speech he refers to the hostile observations which had been made in regard to the company, both with relation to its first coming into existence, and to its existence after (to use Lord *Hatherley's* term in the earlier part of his speech) it had been born, in justifying the order which *Giffard*, L.J., had made.

I have gone through that case at some length, because I consider it only right and respectful to the House of Lords, sitting as I do here, to consider the speeches of the noble Lords carefully. I have done that to the best of my ability, and I think I should not be justified in making an order to wind up this company on the sole ground that it has not carried on substantially business in this country. Of course the case which I have to deal with, as I have already pointed out, is entirely distinguishable from the one which the House of Lords dealt with. I rely to a great extent on the 83rd article, which, as I said before, gives a discretionary power to the directors, and which the directors appear to me to have exercised honestly and for the general benefit of the company.

The result, therefore, is that the petition fails.

Solicitors: *Halse, Trustram, & Co.; Beall & Co.; W. F. Nokes; Stoneham & Legge; G. S. & H. Brandon; Greenfield & Abbott.*

G. M.

In re F. BRABY & CO.'S APPLICATIONS.
In re SHROPSHIRE IRON COMPANY'S TRADE-MARKS.

NORTH, J.
1882
April 21.

Trade-marks Registration Act, 1875 (38 & 39 *Vict c.* 91), *s.* 6—*Trade-mark Rules*, 1876, *rr.* 17, 19—*Old Mark registered for part of a Class—Registration of New Mark for other Goods in same Class—Limited Registration.*

A new mark may be registered for some of the goods in a class, even though an old mark of a similar kind has been already registered for other goods in the same class, provided that the goods and the trades of the proprietors are sufficiently distinct for no confusion to take place.

THESE were two motions by *F. Braby & Co.*, zinc and galvanised iron merchants, by which they sought to obtain registration of certain trade-marks, and, if necessary for that purpose, to rectify the register in respect of certain trade-marks belonging to the *Shropshire Iron Company*.

F. Braby & Co. were incorporated in 1865, and one of the principal articles in which they dealt was galvanised iron sheets. On these goods they originally used a trade-mark consisting of a castle, and in 1872 and 1873 a trade-mark, of which the original features were a rising or half sun, the name of the company, and the words "*Sun Brand*."

In January, 1876, they commenced to manufacture a superior quality of iron sheets under letters patent, and on these they placed a trade-mark the principal features of which were a sun, the name of the company, and the words "*Sun*" or "*Sun Brand*." When this new "*Sun Brand*" mark was adopted by the company they were not aware of any other similar mark having been previously used on any metal goods, and it was not disputed that they had acted *bonâ fide*. This mark was used by them on goods, trade circulars, &c., to a large extent, and the names "*Sun*" or "*Sun Brand*," as applied to galvanised sheets, became connected with goods of their manufacture.

In January, 1876, *Braby & Co.* applied for the registration of their mark in one of its forms as a new mark in respect of "galvanised iron, plain and corrugated," being some of the goods contained in class 5 under the *Trade-marks Registration Act*, under the

NORTH, J.
1882
In re F. BRABY & CO.'S APPLICATIONS.
In re SHROPSHIRE IRON COMPANY'S TRADE-MARKS.

number 1208; and in May, 1876, the mark was advertised in the *Trade-marks Journal*, but the mark was not registered; and in February, 1877, the Registrar of Trade-marks referred *Braby & Co.* to a mark advertised in the name of the *Shropshire Iron Company*, and to the 19th rule of the Trade-mark Rules, and informed them that unless the claim of the *Shropshire Iron Company* was displaced he could not proceed with their registration.

The mark No. 3962, to which the Registrar referred, consisted of the device of a sun, and was claimed for "iron and all kinds of rolled, drawn, and galvanised wire and strand," being goods contained in class 5, and was alleged to have been used about nine years before March, 1876. The application of the *Shropshire Iron Company* was dated the 17th of March, 1876, and was advertised in the *Trade-marks Journal* on the 31st of January, 1877.

The registration of the mark No. 3962 was not opposed by *Braby & Co.*, and it was registered in due course, and in 1878 the *Shropshire Iron Company* registered another mark, No. 11,983, consisting of their former device of a sun with the letters "*S. I. Co.*," and the words "bar iron" for goods contained in class 5, namely, "bar iron, small rounds and squares, and all kinds of merchant iron, none of such goods being of steel, or of steel and iron combined, or having a cutting edge within the meaning of that expression as used in the 23 Vict. c. xliii."

Braby & Co. continued to use their mark in its various forms down to the spring of 1881, when the *Shropshire Iron Company* having then, as they alleged for the first time, discovered the use of the mark by *Braby & Co.*, required the latter to discontinue its use, which they refused to do; and in February, 1882, applied for registration of their trade-mark for corrugated galvanised iron sheets in class 5 under the number 27,557 as a new mark, alleging six years' prior user, but the Registrar, for the same reasons as before, refused to register.

Braby & Co. now moved that the Registrar might be authorized and directed to proceed with their two applications; and they also moved for the insertion in the description of goods in respect of which the *Shropshire Iron Company's* marks were registered of the words, "not including corrugated galvanised iron sheets," or for such other rectification as the Court might think fit.

The evidence shewed that the names "*Sun*" and "*Sun Brand*," as applied to goods of the descriptions produced by the *Shropshire Iron Company* were indicative of their make, but that they had never manufactured iron sheets, and the allegations of *Braby & Co.* that the descriptions of goods were distinct was not denied.

Romer, Q.C., and *Sebastian*, in support of the motion:—

The Master of the Rolls directed the registration of a new mark for part of a class, notwithstanding that an old mark was previously registered in a different name for other goods in the same class: *In re Jelley, Son, & Jones* (1). The distinctiveness of these galvanised sheets from the other goods in the class is shewn by *In re Lysaght* (2). The *Shropshire Iron Company* are in this dilemma, either the goods for which they registered their mark do not clash with ours, or else, in claiming an old user for goods which do include ours, they have made a mis-statement, since it is admitted that they have never made iron sheets.

Ince, Q.C., and *Dundas Gardiner*, for the *Shropshire Iron Company*:—

This case is governed by *In re Hargreaves' Trade-mark* (3). No trader has a right to adopt a new trade-mark which may clash with an old one: *Seixo* v. *Provezende* (4); *Orr Ewing & Co.* v. *Johnston & Co.* (5).

Rule 19 forbids registration where a similar mark is registered for any goods in the class. Our registration is for the whole class, though we have used it as an old mark for a part only of the class. Though our goods may not be the same as theirs, yet they may come into collision in the course of trade, and we are entitled to be free from this possibility; and, moreover, if at any time hereafter we make galvanised iron sheets we shall be entitled to put our trade-mark on them.

Stirling, for the Registrar.

(1) Sebas. Digest of Trade Mark Cases, No. 616.
(2) Sebas. Digest of Trade Mark Cases, No. 623.
(3) 11 Ch. D. 669.
(4) Law Rep. 1 Ch. 192.
(5) 13 Ch. D. 434.

NORTH, J.

1882

In re F BRABY & Co.'s APPLICATIONS.

In re SHROPSHIRE IRON COMPANY'S TRADE-MARKS.

NORTH, J.:—

Mr. *Romer*, I will not trouble you to reply. In my opinion the applicants in this case are entitled to succeed. I am unable to accept the arguments which have been pressed upon me that in adopting the trade-marks now in question the applicants were acting with the view of taking the *Shropshire Iron Company's* mark. It appears to me that the two trades of the two companies are separate and distinct from beginning to end. The Respondents, as they themselves say, have never traded in the goods in respect of which these marks are now applied for, viz., corrugated galvanised sheets, at all. The 19th of the Trade-mark Rules, 1876, says this, "Where a trade-mark has been already registered in respect of any goods or description of goods belonging to one particular class, a trade-mark identical with such trade-mark, or so nearly resembling the same as to be calculated to deceive, shall not, without leave of the Court, be registered in the name of another person as proprietor thereof with respect to any goods in that class." That rule follows upon rule 18, which authorizes the Registrar to deal with conflicting claims in respect of trade-marks, none of which are registered; so that the difference is that if one of the marks is registered the matter is to be brought before the Court, and the Court is to deal with it. If the sanction of the Registrar in the one case or of the Court in the other is obtained, it appears to me that two similar marks may be registered in respect of different goods in the same class by different persons. The application now before me is an application for such sanction of the Court to be given, and the question is one for my discretion. As I have already said, I do not consider that there has been any bad faith in the matter; if I thought there had been, I should be disposed to regard the matter very differently. Then, apart from that, is there any other reason why I should decline to accede to the application? The evidence all goes to shew that *Braby & Co.* are doing a considerable business under the mark and name which they claim, and that it would inflict a serious injury upon them if I were to refuse their application. The *Shropshire Iron Company* themselves did not find out, as they say, for several years, not until 1881, that *Braby & Co.* were using the mark, and that circumstance seems to me to be strongly in favour of the conclusion

that there is no clashing between their respective trades. If that had been otherwise I might have had some difficulty in believing that the applicants did not know of the *Shropshire Iron Company's* mark when they adopted theirs. But that is not so. Rule 19 clearly contemplates the registration of the same trade-mark for different goods in the same class, and I can see no reason why I should not here exercise the power which is given me to direct that to be done. Reasons are not wanting why I should do so, for if I do not do so the applicants will be injured, while if I do direct registration, no harm will be done to the respondents. They have no right of trade-mark in respect of the goods for which the applicants claim their trade-marks. These trade-marks are registered, not in respect of class 5 as a whole, but only for the particular description of goods in that class which are entered in the register. I can therefore see no reason why I should not do what is asked, and I shall direct the Registrar to proceed with both applications of *Braby & Co.* for registration. The order will be made on both motions in accordance with the terms of the first motion. The second motion has not been argued, but at present I think that I could not have acceded to it. The applicants must pay the Registrar's costs, but there will be no further order in respect of costs, as Mr. *Romer* does not press the point.

Solicitors: *H. Kimber & Co.; Fowler & Perks; Hare & Fell.*

G. M.

NORTH, J.

1882

April 22.

In re ALDRED'S ESTATE.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 69 [*Revised Ed. Statutes, vol. ix., p.* 642]—*Reinvestment—Tenant for Life—Remainderman—Trust Estate—Permanent Repairs—Recouping Trustee.*

Under a will *A.* was tenant for life of a copyhold house and two leasehold houses. The latter having been taken under the *Lands Clauses Consolidation Act*, the purchase-money was paid into Court under the 69th section. The trustee of the will having entered into a contract for putting the copyhold house into permanent repair, and there being no trust funds in hand out of which the expense could be defrayed, the Court, upon a petition for reinvestment presented by the tenant for life and the trustee, and without requiring service on the remaindermen, ordered the contract price of the repairs to be paid to the trustee out of the fund in Court, and the remainder to be invested in consols and the dividends paid to the trustee.

THIS was a petition for reinvestment of money paid into Court under the 69th section of the *Lands Clauses Consolidation Act*, 1845.

The Petitioner, *Thomas Aldred*, was the sole trustee under the will, dated in 1823, of *Robert Aldred* deceased, and the Petitioner *Susan Peterson*, widow, was under such will entitled for life to two-thirds of the net rents of a copyhold house at *Lowestoft*, and of two leasehold houses at *Camberwell*.

In the year 1880 the Metropolitan Board of Works purchased the two leasehold houses under the *Metropolitan Improvement Act*, 1877, which incorporates the *Lands Clauses Act*, and, as the will contained no power of sale, paid the purchase-money, £160, into Court under the 69th section of the latter Act. At the date of the purchase there were about ten years to run of the lease under which the property was held.

The copyhold house at *Lowestoft* having fallen out of repair owing to its having remained for some time untenanted, the Petitioner, *Thomas Aldred*, acting under the advice of a surveyor and with the consent of the Petitioner, Mrs. *Peterson*, had entered into a contract for putting the premises into proper and permanent repair at a cost of £50 according to a specification. These repairs had been already commenced and were now approaching completion.

There being no moneys in hand from the trust estate out of which the cost of the repairs could be defrayed, and the Petitioner *Thomas Aldred* having, as trustee, become personally liable under the contract, the Petitioners prayed that out of the £160 in Court the contract price of the repairs might be paid to the Petitioner *Thomas Aldred*, and that the remainder might be invested in consols and the dividends paid to him as trustee.

The parties entitled to the *corpus* of the two-thirds of the copyhold and leasehold property in remainder upon the death of Mrs. *Peterson* were children of a deceased sister; and they were also entitled in possession to the remaining one-third. They were not served with the petition.

T. A. Roberts, for the Petitioners, submitted that Mrs. *Peterson*, the benefit of her two-thirds of the net rents of the leaseholds having been taken from her by the compulsory sale, was entitled to receive yearly so much of the capital of the £160 as would during the remainder of the lease exhaust two-thirds of such capital as well as two-thirds of the income of the remaining capital: *Askew* v. *Woodhead* (1): and that taking this into account, together with the fact that the expenditure proposed was necessary to the preservation of the trust estate, the Court had jurisdiction to make the order asked for: *In re Leigh's Estate* (2).

Arkcoll, for the Metropolitan Board of Works.

NORTH, J.:—

Having regard to *In re Leigh's Estate*, I am of opinion that I can make the order. The order will therefore be as prayed, with costs according to the Act.

Solicitors: *E. Chalk; Solicitor to Metropolitan Board of Works.*

(1) 14 Ch. D. 27.

(2) Law Rep. 6 Ch. 887.

G. I. F. C.

NORTH, J.

1882

May 3.

In re EDWARDS.
BROOKE *v.* EDWARDS.

[1880 E. 861.]

Practice—Discharge of Prisoner in Custody for Contempt—Sheriff—Debtors' Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.

No order is necessary for the discharge of a prisoner in custody for contempt under any of the exceptions contained in sect. 4 of the *Debtors' Act*, 1869, where the writ of attachment has appended to it a note in the following terms:—"NOTE.—This writ does not authorize an imprisonment for any longer period than one year."

It is now the usual practice to append the above note to all writs of attachment issued under the above section.

BY sect. 4 of the *Debtors' Act*, 1869, it is provided that no person shall, after the commencement of the Act, with the exceptions thereinafter mentioned, be arrested or imprisoned for making default in payment of a sum of money. Then follow the exceptions, among them being default by a trustee or person acting in a fiduciary character, and ordered to pay by a Court of Equity any sum in his possession or under his control. The section also provides that no person shall be imprisoned in any case excepted from the operation of the section for a longer period than one year.

On the 4th of May, 1881, the Defendant was committed to *Devizes* Gaol as a person coming under the above exception.

The writ of attachment was as follows:—"We command you to attach *Elisha Edwards* so as to have him before us in our High Court of Justice, there to answer to us as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf." To this writ was added the following:—"NOTE.—This writ does not authorize an imprisonment for any longer period than one year."

This was a motion on behalf of the sheriff of *Wiltshire*, that he

might be ordered to discharge the Defendant, then a prisoner in the county prison of *Devizes*, from the said prison on the 4th day of May instant, he having been detained there for a period of one year, and that no action should be brought by either of the parties against the sheriff for any act, matter, or thing he had done, or should do in or touching the attachment, and that the costs of the sheriff of and occasioned by the motion might be taxed and ordered to be paid by the Plaintiffs and Defendant, or one of them.

Rawlins, in support of the motion :—

The writ of attachment is in the usual form, and it commands that the Defendant should be detained so that he may be brought before the High Court of Justice, and until that takes place the sheriff must obey the order, and the prisoner has no claim to be discharged. All that the sheriff has notice of is that the Defendant is committed for contempt, but of what contempt he has no notice. *Nalty* v. *Aylett* (1) decides that in such a case as this an order for the purpose is necessary. *Greaves* v. *Keene* (2) is also in point.

The note at the foot of the writ would not, we submit, in the face of *Nalty* v. *Aylett* authorize the sheriff to discharge the Defendant without an order.

Hornell, for the Defendant, was not called on, but referred to *Moone* v. *Rose* (3).

NORTH, J.:—

This motion is wholly unnecessary. The note at the foot of the writ is a sufficient authority to the sheriff to discharge the prisoner under his custody, and as I am informed by the Registrar that note has been inserted at the foot of writs of attachment for the express purpose of rendering motions of this kind unnecessary. Under these circumstances I decline to make any order on the motion, except that the sheriff pay the prisoner

(1) 43 L. J. (Ch.) 721; 30 L. T. (N.S.) 763; 22 W. R. 857; Seton, pp. 634, 1594, 1596.

(2) 4 Ex. D. 73.

(3) Law Rep. 4 Q. B. 486.

NORTH, J. 1882 *In re* EDWARDS. BROOKE *v.* EDWARDS.

his costs of appearing on the motion. The prisoner could not safely have abstained from appearing, as the notice of motion asked for costs against him.

Solicitors: *Bolton, Robbins, & Busk*, agents for *Jones & Forrester, Malmesbury; Merriman, Pike, & Merriman*, agents for *Merrimans & Gwillim, Marlborough.*

G. M.

NORTH, J. 1882 *May* 3, 6.

CHAPPELL *v.* BOOSEY.

[1882 C. 47.]

*Copyright—Dramatic Piece—Musical Composition—Printing and publishing—Acting or performing—*3 & 4 *Will.* 4, *c.* 15, *s.* 1 (*Revised Ed. Statutes, vol. vii., p.* 355)—5 & 6 *Vict. c.* 45, *ss.* 2, 20, 22 (*Revised Ed. Statutes, vol. viii., pp.* 1152, 1159).

The publication in this country of a dramatic piece, or musical composition, as a book before it has been publicly represented or performed does not deprive the author of such dramatic piece, or musical composition, or his assignee, of the exclusive right of representing or performing it.

ON the 14th of December, 1881, the Defendant, as the director of the *London* Ballad Concerts, represented or performed, or caused or permitted to be represented or performed, at one of the *London* Ballad Concerts at *St. James's Hall, Piccadilly*, being a place of dramatic entertainment, a musical composition, or dramatic piece intituled, "*The Bellringer*," without first obtaining the consent in writing of the Plaintiffs, who as assignees of one *John Oxenford*, were the registered proprietors of a subsisting copyright in "*The Bellringer*," and as the Plaintiffs by their claim alleged, contrary to the statutes 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45.

The Plaintiffs' claim was for damages and an injunction to restrain the Defendant from representing or performing "*The Bellringer*," or causing the same to be represented or performed, at any place of public or dramatic entertainment.

The Defendant by his statement of defence denied that the song with musical accompaniment called "*The Bellringer*," was a

dramatic piece, or that it was such a musical composition as is mentioned or referred to in the 20th section of the Act 5 & 6 Vict. c. 45, or that the Plaintiffs had the sole liberty of performing the same. By the second paragraph of the defence he alleged that the song, with the music accompaniment thereto, was published as a book within the meaning of that term in the Act, long before any public performance or representation thereof.

The Plaintiffs demurred to the second paragraph of the statement of defence, alleging that the same was bad in law, on the ground that the publication of the song, with the music accompaniment, as a book before any public performance or representation thereof, did not affect the Plaintiffs' sole liberty of representing or performing the same, and was no defence to the Plaintiffs' claim in respect of the infringement of their rights by the Defendant.

By s. 1 of the Act 3 & 4 Will. 4, c. 15, it is enacted that "from and after the passing of this Act, the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof, or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of *Great Britain* and *Ireland*, in the *Isles of Man*, *Jersey*, and *Guernsey*, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof, or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof, or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall from the time of passing of this Act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property

NORTH, J. 1882 CHAPPELL v. BOOSEY.

the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: Provided, nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place, or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof, or his assignee shall, previously to the passing of this Act, have given his consent to or authorized such representation; but that such sole liberty of the author, or his assignee, shall be subject to such right or authority."

By sect. 2 of the Act of 5 & 6 Vict. c. 45, it is amongst other things enacted "that in the construction of this Act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter press, sheet of music, map, chart, or plan separately published: that the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; that the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied."

The 20th section of the last-mentioned Act is as follows:—

"And whereas an Act was passed in the third year of the reign of his late Majesty to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright: Be it therefore enacted that the provisions of the said Act of his late Majesty and of this Act shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright and of registering the same, shall apply to the liberty

of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this Act to the first publication of any book: Provided always, that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing or causing to be represented or performed the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance."

By the 22nd section of the same Act, it is enacted "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties, that such right should pass by such assignment."

Romer, Q.C., and *Cripps*, in support of the demurrer:—

Macnaghten, Q.C., and *Ingle Joyce*, for the Defendant:—

The very object of publishing a song as a book is that the public may buy it and sing it, and the author cannot afterwards be heard to say that the person buying the song from him must not put it to the use for which it was bought. The exclusive right of representing or performing a dramatic piece or musical composition cannot be gained if such dramatic piece or musical composition has been printed and published as a book before the first representation or performance. That is the view of the law taken by Mr. Justice Stephen, and so enunciated by him in his Digest to the Law of Copyright annexed to the Report of the Copyright Commissioners made in 1878. If that view of the law is correct, which we submit it is, then this demurrer must be overruled.

The following authorities were cited: *Boucicault* v. *Dela-*

NORTH, J. *field* (1); *Boucicault* v. *Chatterton* (2); *Russell* v. *Smith* (3); *Jefferys* v. *Boosey* (4).

1882

CHAPPELL v. BOOSEY.

NORTH, J.:—

In this case the Plaintiffs claim to be the proprietors of the copyright in a musical composition called "*The Bellringer*," and also of the sole liberty of performing the same piece, and they sue the Defendant for infringing that right by performing this composition without their consent at one of the *London* Ballad Concerts at *St. James's Hall*.

The Defendant sets up, among others, the defence that the song in question, with the music accompaniment thereto, was published as a book within the meaning of that term in the Act of 5 & 6 Vict. c. 45, long before any public performance or representation thereof. It is admitted that the word published is equivalent to published and sold.

To this defence the Plaintiff demurs; and the neat question thus arises for decision, whether the publication of a dramatic piece or musical composition as a book before it has been publicly represented or performed, deprives the author or his assignee of the exclusive right he otherwise would have of representing or performing it.

The Defendant relies upon two points:—First he says that the very object of publishing a song as a book is that the public may buy it and sing it; and that the author cannot be heard to say that the person buying the song from him cannot put it to the use for which it is bought. His second point is this, that the present law upon the subject is authoritatively put forward in, and is to be found in, a Digest of the Law of Copyright annexed to the report of the Copyright Commissioners made in 1878, and adopted by them, as appears from the 6th and 14th paragraphs of that report. Article 14 of the Digest runs as follows: "The exclusive right of representing or performing a dramatic piece or musical composition cannot be gained if such dramatic piece or musical composition has been printed and published as a book before the first representation thereof."

(1) 1 H. & M. 597.
(2) 5 Ch. D. 267.
(3) 15 Sim. 181.
(4) 4 H. L. C. 815.

This certainly is very much in point for the Defendant; and I should add, while referring to that digest, that the 16th article runs as follows: "A dramatic piece or musical composition published as a book may (it seems probable) be publicly represented without the consent of the author or his assigns."

The report, however, is not quite so strong, for the 73rd paragraph says, referring to dramatic pieces and musical compositions: "It is a question what becomes of the performing copyright on the publication of the work as a book; and there is a further question whether the performing copyright can be gained at all if the piece is printed and published as a book before being publicly performed." I must say at once that I cannot regard this digest and report as in any way binding me as to the decision to which I ought to come, though I have carefully considered them as an assistance to me in forming my own conclusions on the subject. I may add that the articles I have just read seem not to have been quite in accordance with the views of the trade; for the present Defendant was examined before the commission, and I find in his published evidence—

Q. 1983* p. 101. When you have published a song, may people sing it in public without the author's leave?—*A.* No, not without the author's leave.

And again, *Q.* 1986*. Would a composer have a right to prevent a person from singing his song in public, he having published it?—*A.* Certainly; he could demand £2 a night.

Now, in my opinion, the law stands thus.

Under the *Statute of Anne* the author of a dramatic piece or musical composition acquired a copyright in his work so as to be enabled to prevent any other persons from multiplying copies of it; but this did not prevent any one who thought fit to do so from representing or performing it.

The privilege of an author of a dramatic piece was extended by the Act of 3 & 4 Will. 4, c. 15, commonly called *Sir Bulwer Lytton's Act*, which provided that the author, or assign of the author, of any dramatic piece which was not printed or published, whether then already composed or thereafter to be composed, should have as his own property, and be proprietor of, the sole

NORTH, J. 1882 CHAPPELL v. BOOSEY.

liberty of representing the same at any place of dramatic entertainment for a period not clearly defined and not at present material; and that the author or assign of the author of any such piece, which was printed and published after or within ten years before the passing of that Act, should have the like sole liberty of representing the same for the term of twenty-eight years from the passing of the Act, or from the publication of the piece if it was first printed and published after the passing of the Act, or until the end of seven years after the author's death, whichever term should prove the longer.

After the passing of this Act, therefore, the author had two different rights: one, that of copyright proper, preventing the multiplication of copies of the piece itself; the other being what may be called the acting right or performing right, conferring upon him the power of preventing other persons from publicly representing or performing the piece without his consent. This Act, however, did not extend or apply to musical compositions except so far as they came within the category of dramatic pieces or entertainments.

By the Act of 5 & 6 Vict. c. 45, commonly known as *Talfourd's Act*, the rights of authors of musical compositions were extended. By the interpretation clause the word "book" was made to include every sheet of letterpress and sheet of music, and the words "dramatic piece" were made to include every scenic, musical, or dramatic entertainment.

The 20th section of that Act is as follows. [His Lordship read the section as set out above:—]

By this section musical compositions of every kind were brought within this and the former Act, and the author of them acquired the double right before referred to, viz., first, that of copyright proper in the piece itself as a book; continuing (in the case of every book published after the passing of the Act in its author's lifetime) until the expiration of seven years from the death of the author, or forty-two years from the first publication of the book, whichever period should be the longer; and second, that of acting right or performing right, continuing until the expiration of the seven years from the death of the author or forty-two years from the first public representation or performance of the piece, whichever

should be the longer. These rights are quite distinct, each being a separate property, and each capable of being assigned without the other; and they would or might expire at different times, except in the case of the book being first published, and the piece being first publicly performed on the same day.

Now, it is contended for the Defendant, that the fact of the publication for sale of a musical composition as a book prevents the subsequent acquisition or enjoyment of the acting or performing right. Why should it do so? It is said that no one would buy such a piece if the purchaser could not use the piece he paid for, and therefore that the sale of the piece necessarily carries with it the right to make such use of it as the purchaser thinks fit. But this consequence does not follow; for it is only the performance of the piece in public, that under the section I have just read the existence of the acting or performing right prevents; and it is obvious that the greater number of sales of musical pieces take place to persons for private use and without having any public performance in contemplation.

In the next place, I think, that if the publication of a musical composition as a book before the piece had been publicly performed prevented the subsequent acquisition of any acting or performing right, it must follow that the publication of the same composition as a book at any time after the piece had been publicly performed, would from that time forward put an end to any acting or performing right in the piece existing prior to such publication, for the reasons existing in the former case would be of equal weight in the latter. If so, the Defendant's contention comes in short to this, that the enjoyment of, or the power of acquiring, the acting or performing right is determined by the publication of the book at any time; and the author must choose whether he will abstain from publishing the book, and thus be unable to reap the benefit of the copyright therein which the Act confers upon him, in which case he can enjoy the acting right; or whether he will publish the book, and lose thereby the acting or performing right. I cannot find anything in the Act, or in reason, to support this contention. Definite periods of duration for the two rights are given by the Act, and I cannot come to the

NORTH, J. 1882 CHAPPELL v. BOOSEY.

conclusion that those periods are cut short by any conditional limitation unless it can be found in the Act itself, and I have not had pointed out to me nor have I discovered any words pointing to that conclusion.

But the case does not rest here. The Act does, in my opinion, directly shew upon its face that the publication of the piece as a book does not prevent the continuance of the acting or performing right. The 22nd section of the Act is as follows. [His Lordship read the section as above set out.] That section recognises the two rights as existing simultaneously, and I think it impossible for me to read that section as confined to the case of books which have not been published. I read the word "book" there as including books published as well as unpublished; especially when I see that the section provides for an entry in the registry book of the assignment, and this implies that the copyright referred to by the section has already been registered, and registration under the Act can only take place after publication, the date of which must appear in the first entry in the registry book. Moreover, I think that the word "assignee" in that section must receive the same construction as the word "assign" in the interpretation clause, by which that word is made to include every person in whom the interest of an author in copyright is vested, whether derived from the author before or after the publication of the book.

Before passing from that section, I would mention that it appears to have been framed to obviate the consequences of the decision in *Cumberland* v. *Planché* (1), which case held that an assignment of the copyright in a dramatic piece had the effect of assigning the acting right also. In that case the piece had been already printed and published, and, therefore, if the contention of the present Defendant is sound, the acting right, which was the subject of the decision, had no existence in fact. This point does not seem to have occurred to Sir *F. Pollock* or Sir *James Scarlett*, who argued the case, or to any of the four Judges who decided it.

In coming to the conclusion above expressed as to the present

(1) 1 Ad. & E. 580.

state of the law, which is at variance with that propounded in the Digest before referred to, I think that the Digest shews how the error, which in my opinion exists in it, has arisen. The 14th article, which I have read, has a note to it to the effect that the proposition contained in it seems to be involved in the 1st section of the Act 3 & 4 Will. 4, c. 15, the effect of which was given in the 13th article. The 13th article says, to put it shortly, that the author of any dramatic piece or musical composition not printed and published by the author has the sole right of representing the piece for the periods therein mentioned. If this were the whole of the 1st section of that Act, and no other section or statute bore upon the subject, it would be difficult to find fault with the conclusions arrived at in the 14th article; as, if the performing right were the mere creature of the statute, and the statute created it only in the case of pieces not printed and published, it would follow that it could not be acquired in pieces which had already been printed and published. But the statute provided, as I have already pointed out, for two different cases, namely, first, for the case of pieces not printed or published; and secondly, for that of pieces printed and published after the passing of that Act, or within ten years before its passing; and the Digest seems, for some reason which I do not understand, to ignore this second case altogether.

With respect to the 16th article of the Digest, that "a dramatic piece or musical composition published as a book may (it seems probable) be publicly represented without the consent of the author or his assigns," I confess my inability to agree with it. It is stated in a foot-note by the learned author of the Digest that the only authority he has been able to find on the point is that of *Murray* v. *Elliston* (1), which seems to imply the proposition contained in the article. But that case was decided in the year 1822, many years before the passing of the Act 3 & 4 Will. 4, c. 15, which Act was the first to create an acting right, and was intended to alter and amend the law which existed when the case of *Murray* v. *Elliston* was decided. If that case had been decided after the Act instead of before it, the decision must have been the other way; unless, indeed, it had been held that the

(1) 5 B. & A. 657.

NORTH, J. 1882 CHAPPELL v. BOOSEY.

alterations made in adapting the piece for the stage had rendered it a new work, in which case it would not have been any authority for the proposition contained in article 16.

Under these circumstances I allow the demurrer in the usual manner.

Solicitors: *Wilkinson & Howlett; Boulton, Sons, & Sandeman.*

G. M.

WALLIS *v.* SMITH.

[1879 W. 457.]

C. A.

1882

FRY, J.

Jan. 3, 12, 13, 14, 16.

C. A.

March 24, 25, 27, 28.

Penalty—Liquidated Damages—Breach of Contract to pay a Sum certain—Breach of several Stipulations of various importance — Forfeiture of Deposit—Lien for Money expended by Party who breaks the Contract.

The Plaintiff entered into a contract with the Defendant, who was a builder, to sell him an estate for £70,000, which was to be expended by the Defendant in building on the estate. The contract contained numerous provisions, and amongst other things that a deposit of £5000 should be paid by the Defendant into the bankers to the joint account of the Plaintiff and Defendant, of which £500 was to be paid on the execution of the contract and the remainder within seven months. If the Plaintiff could not make a good title the deposit of the £500 was to be returned, and the Plaintiff was to pay the Defendant £5000 as liquidated damages. And if the Defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works, or in failing to perform any of the provisions of the contract, then and in either of such events the deposit of £5000 should be forfeited, and if it had not been paid the Defendant should forfeit and pay to the Plaintiff £5000 by way of liquidated damages, and the agreement should be void and of no effect, and the Plaintiff should regain possession of the estate; but credit was to be given to the Defendant for all moneys actually expended; and it was provided that such breach should not be the consequence of a misconstruction of the meaning of any of the provisions of the contract.

The Defendant did not pay the £500 deposit, and altogether failed in carrying out the contract, and the Plaintiff brought an action to recover £5000 as liquidated damages:—

Held (affirming the decision of *Fry*, J.), that the condition of forfeiture was not intended to apply to the payment of the deposit of £500 which was to be paid on the execution of the contract, but to a substantial breach of any of the subsequent stipulations, and therefore the £5000 was not to be regarded as a penalty but as liquidated damages, the payment of which could be enforced against the Defendant.

Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is that the sum named is not to be treated as a penalty, but as liquidated damages.

But whether it would not be treated as a penalty if one of the stipulations was of very trivial importance:—*Quære.*

Where there is a condition for the forfeiture of a deposit for the breach of various stipulations, even though some of them may be very trivial, or for

C. A.
1882
WALLIS
v.
SMITH.

payment of a fixed sum of money, the forfeiture will be enforced and not treated as a penalty.

Astley v. *Weldon* (1); *Kemble* v. *Farren* (2); *Atkyns* v. *Kinnier* (3); *Magee* v. *Lavell* (4); *In re Newman* (5); and *Betts* v. *Burch* (6), commented on.

Per Fry, J.:—A man who enters into a contract to expend a certain sum of money on land, and after spending part of it declines to perform the contract, has no lien on the land for the money which he has expended.

ON the 30th of August, 1879, an agreement of that date was made between the Plaintiff *William Peter Vosper Wallis* and the Defendant *Joseph Melland Smith*. By this agreement the Plaintiff contracted to sell to the Defendant an estate comprising about ninety-five acres on the south side of *Beulah Hill, Norwood*, for the price of £70,000, and the Defendant was to provide the necessary capital, not exceeding £70,000, for the purpose of laying out and making the necessary roads and drains for the said estate, to manufacture bricks, tiles, and terra-cotta out of the clay on the said estate, not only for the houses to be erected on the estate, but for sale; and was to erect houses thereon subject to the terms and conditions thereinafter set forth.

The material clauses in the agreement were as follows:

1. That the memorandum of agreement should form the basis of two contracts to be prepared between the parties, if found necessary, one for the sale of the land by the Plaintiff, and the other for the construction for the works by the Defendant.

5. A deposit of £5000 was to be paid by the Defendant as follows: £500 on the execution of the contract, and £4500 on or before the 31st of March, 1880, such sums to be paid to a deposit account with the *London and County Bank* in the joint names of the Plaintiff and Defendant; such amount being a deposit on £70,000 the purchase-money of the estate.

6. On the execution of this contract and upon payment of the said sum of £500, part of the said deposit of £5000, the Plaintiff should give the Defendant possession of such portions of the estate as might be necessary for carrying out the contract, and the Defendant should proceed to obtain plans and commence the

(1) 2 B. & P. 346.
(2) 6 Bing. 141.
(3) 4 Ex. 776.
(4) Law Rep. 9 C. P. 107.
(5) 4 Ch. D. 724.
(6) 4 H. & N. 506.

works, which were to be completed within ten years. In the event of such works not being completed within ten years, and the Plaintiff and Defendant not agreeing to an extension of the time, then such portions of the estate as might be unsold should be sold by public auction, and the proceeds, after paying such moneys as might be due to the Defendant in respect of moneys expended in respect of the said works, should be applied in paying the balance of the said purchase-money of £70,000, and the remainder should be divided equally between the Plaintiff and Defendant.

7. So soon as the Defendant should have spent a sum equal to £5000 on the works, the Defendant should be entitled to receive back the deposit lodged by him with the bank. The £70,000 was to be expended by the Defendant in carrying on the works till the whole should be completed.

8. After the deposit of £500 had been paid the title of the Plaintiff should be investigated, and if he should be unable to make a good title, the Defendant should be entitled to receive back his deposit of £500, and in addition the Plaintiff should pay the Defendant £5000 as liquidated damages.

9. The Defendant to be entitled in the accounts to 7 per cent. on his disbursements as an equivalent to his personal attention.

10. The proceeds of the sale of the bricks and of the houses and land, and rents and fines on leases, were to be expended in the first place in repaying the capital expended by the Defendant in excess of £5000, it being the intention of the parties that £5000 expended on the estate should be in lieu of and substitution for the £5000 deposit, and the balance to be applied in payment of the said purchase-money of £70,000 until fully paid, and after the repayment of the capital brought in by the Defendant, and the payment of the £70,000 for the land, the proceeds were to be equally divided between the parties from time to time.

13. There was to be no personal liability on the Defendant for payment of the £70,000, nor on the Plaintiff for repayment to the Defendant of any advances for the works; but each party was to look only to the proceeds for payment.

25. If the Defendant should commit a substantial breach of the contract either in not proceeding with due diligence to carry out

C. A. 1882 WALLIS v. SMITH.

and complete the works, or in failing to perform any of the provisions therein contained, then and in either of the said events the deposit money of £5000, whether expended upon the estate or not, was to be forfeited; and if the balance of such deposit had not then been paid, then the Defendant should forfeit and pay a sum of money equal to such balance; the intention being that if default was made by the Defendant as aforesaid he should forfeit and pay to the Plaintiff by way of liquidated damages the sum of £5000, and the agreement to be void and of no effect; but in estimating such £5000, credit was to be given for all moneys expended by the Defendant upon the works other than the plant; and the Plaintiff should not be called upon to pay or give any compensation or satisfaction for any moneys expended by the Defendant on the said estate in pursuance of the contract; the object and intention being that the Plaintiff upon such events happening, should have, and if necessary retake, possession of the estate, with all buildings and works erected thereon, discharged from this contract, without any interference on the part of the Defendant, his heirs, executors, administrators, or assigns; but such breach was not to be the consequence of a misconstruction of the language or meaning of any of the provisions of the contract.

26. If the Plaintiff should fail to fulfil any of the conditions or stipulations of this contract, or should hinder the Defendant in the performance of the stipulations of this contract, or do any act prejudicial to the carrying out of the contract, the Defendant should be entitled to take possession of the whole of the estate without any further payment of purchase-money.

No part of the deposit or sum of £5000 was ever paid by the Defendant, and the Defendant expended nothing on the estate, and performed none of the acts stipulated for in the agreement.

The Plaintiff accordingly brought the present action, claiming £5000 as liquidated damages, or in the event of the Court deciding that the sum named was a penalty, claiming such damages as he might be found entitled to.

The Defendant in his defence alleged that he had been induced to enter into the agreement by the misrepresentations of the Plaintiff as to the price which he had himself given for the land,

and put in a counterclaim asking that the agreement might be set aside and cancelled.

The action came on for hearing on the 3rd of January, 1882.

Cookson, Q.C., and *C. Lyttleton Chubb*, for the Plaintiff, referred to *Astley* v. *Weldon* (1); *Kemble* v. *Farren* (2); *Thompson* v. *Hudson* (3); *Galsworthy* v. *Strutt* (4); *Lea* v. *Whitaker* (5); *In re Newman* (6); *Magee* v. *Lavell* (7).

[FRY, J., referred to *Reilly* v. *Jones* (8)].

Glasse, Q.C., and *Terrell*, for the Defendant, referred to *Boys* v. *Ancell* (9); *Green* v. *Price* (10); *Mayne* on Damages (11).

FRY, J.:—

The question which I have to determine is, whether a certain sum of £5000 mentioned in the agreement of the 30th of August, 1879, is in the nature of a penalty or in the nature of liquidated damages. At the date of the agreement *Wallis* was the owner of some land at *Norwood*, containing about ninety-five acres, and, according to the recital in the agreement, there was on that land a large deposit of clay suitable for the manufacture of bricks, tiles, and terra-cotta, and the land was suitable for the erection of detached or semi-detached private villas. The Defendant *Smith* was a civil engineer, and *Wallis* and *Smith* were minded to co-operate together in what is called the development of this building estate, the object being to establish works which would exhaust, or, so far as necessary, use up the brick earth upon the estate, and to utilise the remaining property in the ordinary way in which building estates are used.

That being the position of the parties they enter into the agreement. [His Lordship stated the general nature of the provisions of the agreement and read clause 25, and continued:—] I pause now to state what appears to be the short effect of that

(1) 2 B. & P. 346.
(2) 6 Bing. 141.
(3) Law Rep. 4 H. L. 1.
(4) 1 Ex. 659.
(5) Law Rep. 8 C. P. 70.
(6) 4 Ch. D. 724.
(7) Law Rep. 9 C. P. 107.
(8) 1 Bing. 302.
(9) 5 Bing. N. C. 390.
(10) 13 M. & W. 695.
(11) 3rd Ed. p. 125.

C. A. 1882 WALLIS v. SMITH. Fry, J.

clause. In the first place, the breach must be substantial, it must go to the substance of the contract. In the next place, it must be what I may describe as wilful. A breach which arises in consequence of the misconstruction of the language or meaning of any provision of the contract is not to come within the operation of this clause. In the next place, the mode in which the clause will operate appears to me to be this, that if £5000 or more has been expended upon the estate, the estate will revest in *Wallis*, so far as it had been divested from him, and remain in him discharged from any right of *Smith* to be repaid the money which he had expended upon it. To that extent it appears to me that the clause operates very little, because, supposing *Smith* laid out money upon *Wallis's* land (and such it remained until the performance of the contract for certain purposes) and then thought fit to decline to go on with his contract, *Smith* would lose his money, and *Wallis* would be entitled to keep his land. It has been suggested that *Smith* might have a lien on the land for money actually expended on it. But it appears to me on principle, that a man who declines to perform his contract can have no lien for money which he has expended in part performance of it. If, on the other hand, less than £5000 has been expended, then the clause provides that *Smith* is to pay *Wallis* the difference (if any) between the amount expended and the £5000. Of course if no money had been expended by *Smith* and the breach had taken place, then he must pay the whole £5000. If any money has been expended short of £5000, then *Smith* is to pay the difference.

This further observation must be made, that the contract evidently contemplates the deposit in the *London and County Bank* as the primary fund for the payment of the £5000, and, so long as the deposit remains in the bank, that is the fund to which recourse is to be had for payment of the £5000, or part of the £5000, as the case may be. Moreover, the sum of £5000 is one which has been referred to in several previous paragraphs of the agreement. It is the sum which *Wallis* is to pay by way of liquidated damages to *Smith* in the event of *Wallis* not making out a good title to the land. It is the sum which *Smith* is to leave in the land, that is to say, he is not to recover by way of repayment in

the event of the contract being carried fully into effect, and it is in clause 25 indicated as the amount which is to be paid by way of liquidated damages by *Smith* to *Wallis* if the full amount of £5000 has not been expended by *Smith* on the land.

I cannot, therefore, upon that clause come to any other conclusion than this, that the parties did really mean that, if *Smith* prevented *Wallis* from getting the benefit of the performance of this contract, he should either leave the sum of £5000 or more in the land, or should pay the £5000 or the difference between it and the sum which he had expended. That conclusion is, to my mind, strongly fortified by clause 26. [His Lordship read it.] It appears to me that in construing this clause I ought not to consider the question whether the Court might grant relief against it upon a ground of equity independent of the contract. As a matter of construction it appears to me plain that the intention of the clause is that *Wallis*, if he really deprives *Smith* of the benefit of the contract being performed, is to make over the estate to him. It comes, therefore, to this, that by the joint effect of the 8th and the 26th clauses, if *Wallis* commits default in making out his title or in conveying he is to pay £5000. If he defeats the contract by any other act he is to give up the land to *Smith*, and in a corresponding manner, by the 25th section, if *Smith* in substance prevents *Wallis* from having the benefit of the contract, he is to give up all claim to any interest in the land, and is to pay *Wallis* £5000, or the difference between £5000 and the amount expended on the land, as the case may be. That appears to me to be the true construction of the agreement.

Is there anything in the decided cases which compels me to put upon it any other construction? The question whether a sum is a penalty or liquidated damages is one of construction. That is the primary rule. Certain subordinate rules have also been laid down with regard to the mode in which the Court is to construe agreements of this description. In the first place it is quite plain that the words "liquidated damages," describing the nature of the payment, are by no means conclusive. It was thought in *Reilly* v. *Jones* (1) that they were conclusive, but *Kemble* v. *Farren* (2) has shewn that they are not. In *Green* v.

(1) 1 Bing. 302. (2) 6 Bing. 141.

C. A. 1882 WALLIS v. SMITH. Fry, J.

Price (1) the Court of Exchequer seem to have thought that the *onus* of proof was upon those who asserted that a sum described as "liquidated damages" was a penalty. In every case the Court seems to have thought that the words had little or no operation. But whether the words have any, and, if so, any serious operation, does not appear to me very material to decide in the present case, because in what I have already said I have proceeded upon that which appears to me to be the real nature and substance of the agreement.

Again, there is a numerous class of cases which shew that where there are a number of things to be done, and one large sum is to be paid in respect of the non-performance of various matters of different degrees of importance, there the Court will construe the sum, if it can do so, as a penalty, and not as liquidated damages. But here, as I have already pointed out, clause 25 does not apply except in the case of a breach which is at once wilful and substantial, and a breach which is wilful and substantial must always be of great consequence to the party against whom it operates. In substance, therefore, the clause applies to one act, and to one act only. There are several cases which shew that, where the sum which is to be dealt with is already in the hands of a stake-holder, or a third person by way of deposit, and that deposit is to be applied in payment of the sum, the Court must construe it as liquidated damages, and not as penalty. In that there seems to me to be great good sense, and for this reason, that if a fund is set apart to meet a particular contingency which is described, and that contingency arises, it is difficult to say that the stake-holder, or other person having the fund, is not to hand it over at once to the person who claims it under the contingency which has happened. That was one of the circumstances which occurred in *Reilly* v. *Jones* (2). There the sum declared to be in liquidated damages was either in whole or in part deposited, and although the Court do not seem explicitly to have referred to that, but determined the case mainly upon a ground on which the decision cannot now be upheld, it must not be overlooked that there was this ingredient in the case. There are, however, other authorities more distinct upon this point. In *Hinton* v. *Sparkes* (3), one

(1) 13 M. & W. 695. (2) 1 Bing. 302. (3) Law Rep. 3 C. P. 161.

stipulation was that a sum of £50 was to be paid as an earnest of the agreement, and it was followed by another, that "if either of the parties neglect or refuse to comply with any part of this agreement he shall pay to the other £50 hereby mutually agreed upon to be the damages ascertained and fixed on breach hereof," and "if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited in part of the following damages." There Chief Justice *Bovill* said (1): "All that it is necessary, therefore, for us to do is to see if there is any contract here, express or implied, that the deposit shall, in the event which has happened, become forfeited. There is an express contract here that the £50 shall become forfeited on the purchaser's failure to perform his part of the agreement. It is true the words 'in part of the following damages' are added. But I do not think that makes any difference. If the stipulation had simply been 'if the purchaser shall fail to fulfil his part of the agreement then the deposit money shall become forfeited,' there could not in my mind have been the slightest doubt." And Mr. Justice *Willes* stated his view in these words, "Here, however, there is an express provision that the deposit money shall become forfeited should the purchaser fail to fulfil his part of the agreement. It is true the agreement adds 'in part of the following damages,' one of which is the £50."

Again, in *Lea* v. *Whitaker* (2) similar circumstances occurred, and Mr. Justice *Keating* in delivering judgment observed (3), "Looking at the language of this agreement, I come to the conclusion that the parties did intend the £40 to be paid as and for liquidated damages for the breach of the agreement by either of them. I infer this from the fact that the £40 has been placed in the hands of a stakeholder, as the agent of both. That reduces it to this, that the £40 has already been paid by the Defendant into the hands of the Plaintiff's agent as and for liquidated and ascertained damages for the breach of the agreement by the former." And Mr. Justice *Denman*, after referring to *Hinton* v. *Sparkes* (4), said, "Here, however, there is an express provision that the deposit

(1) Law Rep. 3 C. P. 165.
(2) Law Rep. 8 C. P. 70.
(3) Law Rep. 8 C. P. 74, 77.
(4) Law Rep. 3 C. P. 161.

C. A. 1882 WALLIS v. SMITH. Fry, J.

money shall become forfeited should the purchaser fail to fulfil his part of the agreement."

Lastly, in *Magee* v. *Lavell* (1) Mr. Justice *Denman*, referring to *Lea* v. *Whitaker* (2), said, "With regard to that case I think it will be found that I based my judgment on the ground that there was a special agreement that the deposit was to be forfeited in the event of a breach of the contract." I will observe that Mr. Justice *Keating* also considered that *Lea* v. *Whitaker* was rightly decided. These authorities are very strong to shew that, where a deposit has been placed in the hands of a third person, and that is primarily the fund for payment of the sum in question, that sum is liquidated damages and not a penalty. That applies strongly to the present case.

I come, therefore, to the conclusion that, even if I neglected entirely to give any effect to the words "liquidated damages" in the agreement, the substance of the agreement is, that the £5000 is to be paid primarily out of the deposit money, and if not out of the pocket of the Defendant. I must, therefore pronounce judgment for the Plaintiff for £5000, and the costs of the action.

The case was then tried on the question of misrepresentation.

His Lordship upon the evidence held that the Defendant had failed to prove his allegations of misrepresentation, and he dismissed the counterclaim with costs.

W. L. C.

C. A.

From this decision the Defendant appealed. The appeal came on to be heard on the 24th of March, 1882.

Macnaghten, Q.C., and *Terrell*, for the Appellant:—

The whole transaction was a fraud on the part of the Plaintiff. The value of £70,000 put upon the estate was a mere guess. The whole transaction was a bubble, and the Plaintiff can recover nothing on the contract: *Walters* v. *Morgan* (3). But admitting that the contract was *bonâ fide*, the Plaintiff can only recover for any damage which he has actually sustained. The condition for

(1) Law Rep. 9 C. P. 107, 116. (2) Law Rep. 8 C. P. 70.
(3) 3 D. F. & J. 718.

payment of £5000 for breach of any of the stipulations, whatever words may be used in the contract, must be construed as a penalty, not as liquidated damages. One of the stipulations was for payment of the first deposit of £500, and therefore the case comes within the ordinary rule, that where the forfeiture is for non-payment of a smaller sum it may be relieved against as a penalty. And the same rule will apply even if the first deposit of £500 be put out of account, for the clause applies to breaches of a great number of stipulations, some of which are of very small importance, and in such cases the Court will also construe the condition as a penalty: *Reilly* v. *Jones* (1); *Horner* v. *Flintoff* (2); *Davies* v. *Penton* (3); *Astley* v. *Weldon* (4); *Betts* v. *Burch* (5); *Boys* v. *Ancell* (6); *Green* v. *Price* (7); *In re Newman* (8); *Thompson* v. *Hudson* (9); *Mayne* on Damages (10).

Cookson, Q.C., and *Chubb*, for the Plaintiff:—

The contract was perfectly *bonâ fide* on the part of the Plaintiff. The estate contained good clay for bricks and terra-cotta, and there was a fair probability of the building scheme being successful.

There is no reason in this case for interfering with the manifest intention of the parties, that the payment of £5000 should be for liquidated damages.

The payment of £5000 was the forfeiture of the deposit payable on the purchase. The £500 payable on the execution of the contract was not an independent sum, but was part of the deposit of £5000. In cases of vendor and purchaser the Court never releases the parties from their bargain as to forfeiture of the deposit: *Hinton* v. *Sparkes* (11); *Lea* v. *Whitaker* (12); *Magee* v. *Lavell* (13). But independently of that consideration this is not a case in which the payment can be relieved against. It is not a forfeiture of a certain sum for non-payment of a smaller sum, but it is a payment for liquidated damages for breach of numerous

(1) 1 Bing. 302.
(2) 9 M. & W. 678.
(3) 6 B. & C. 216.
(4) 2 B. & P. 346.
(5) 4 H. & N. 506.
(6) 5 Bing. N. C. 390.
(7) 13 M. & W. 695.
(8) 4 Ch. D. 724.
(9) Law Rep. 4 H. L. 1.
(10) 3rd Ed. p. 125.
(11) Law Rep. 3 C. P. 161.
(12) Law Rep. 8 C. P. 70.
(13) Law Rep. 9 C. P. 116.

C. A. 1882 WALLIS v. SMITH.

stipulations, the value of which was not ascertainable. There is no authority for saying that in such a case the estimated sum can be regarded as a penalty and relieved against: *Reilly* v. *Jones* (1); *Sainter* v. *Ferguson* (2); *Galsworthy* v. *Strutt* (3); *Atkyns* v. *Kinnier* (4); *Reynolds* v. *Bridge* (5); *Kemble* v. *Farren* (6); *Rawlinson* v. *Clarke* (7); *Sparrow* v. *Paris* (8).

Macnaghten, in reply.

JESSEL, M.R.:—

This appeal raises a question of very considerable difficulty, and one as to which it is not impossible that learned Judges may in future differ as Judges have differed in times past.

The case was opened, if I may say so, with the greatest fairness. The Appellant's counsel, Mr. *Macnaghten*, said that if there were no authorities to be cited the meaning of the agreement is plain, and I agree with him. The only question we have to decide is whether the authorities compel us to construe this document in an extraordinary or non-natural sense contrary to the plain meaning of the words. Of course if cases have laid down a rule that in certain events words are to have a particular meaning and that has become a settled rule, it may be assumed that persons in framing their agreements have had regard to settled law, and may have purposely used words which, though on the face of them they may have a different meaning, they know by reason of the decided cases must bear a particular or special meaning; and therefore we must consider whether there are cases which lay down any such rule making a settled law in the sense of being binding on this Court.

The agreement in question is an agreement of a peculiar kind. It is a sort of partnership between the Plaintiff, Mr. *Wallis*, and the Defendant, Mr. *Smith*. It is dated in August, 1879, and after some very special provisions, which I need not read, come three important clauses, namely, the 5th, 6th, and 25th clauses. [His Lordship read the clauses.]

(1) 1 Bing. 302.
(2) 7 C. B. 716.
(3) 1 Ex. 659.
(4) 4 Ex. 776.
(5) 6 E. & B. 528.
(6) 6 Bing. 141.
(7) 14 M. & W. 187.
(8) 7 H. & N. 594.

The 25th clause is that on which the question turns, and the first question of construction is whether that clause does or does not apply to the non-payment of the first deposit of £500. It appears to me that it does not. I never give a very confident opinion on questions of construction of ambiguous instruments, but I think the fair meaning of the clause is this—that the deposit of £500 is contemplated to be paid on the execution of the contract, and the idea did not seem to occur to the parties that it would not be paid. It was not in fact paid. Therefore we find that what is to be forfeited is the deposit money, that is what it means; and if the balance of the deposit has not been paid, that means the balance after providing the £500, then a sum equal to that balance. It contemplates its being paid in any event. Therefore it appears to me the parties did not contemplate the non-payment of the £500.

There is another observation to be made about the £500 assuming that construction not to be right. It has been observed that the non-payment of the £500 prevents the 6th clause coming into operation, so that *Smith* cannot take possession and proceed with the works. How then can you ascertain the damage? It is not merely the non-payment of the £500 on the deposit account, it prevents the works being proceeded with. It does not appear to me to be very easy to ascertain the damages.

In the next place is this a proper deposit? That again is a question which has arisen in many of the cases. It appears to me it is. It is a deposit in part payment of the nominal purchase-money. It is a deposit in joint names, therefore no doubt in one sense it is not putting it out of the power of *Smith*; but in another sense it is. The moment you put it in joint names it is out of his power, though the other party cannot deal with it without his consent. It is a security for the performance of the agreement.

Then again is it true that the 25th clause lasts for ten years so as to forfeit the deposit? It appears to me it does not. The balance of the deposit was contemplated to be paid on the 31st of March then next, the agreement being in August, and it is then to be laid out on the works. It is clear there is no forfeiture after that, because in estimating the £5000 credit is to be given

C. A. 1882 WALLIS v. SMITH. Jessel, M.R.

for all moneys expended. The moment you have expended that £5000 there is no deposit to forfeit. It is quite true the agreement has been put an end to, and that that destroys the right of *Smith* to get back his money, but it is no longer a forfeiture in any other sense of the word.

Then again there is this to be said: the non-payment of the £500 prevents the performance of the agreement. If the £500 is included in the proviso for forfeiture that is not a single event of the nonpayment of money, but it is a double event of the non-payment of the money and the avoidance of the agreement.

It appears to me therefore, that we have in this case two elements, the one is that there is no single event as to which the damages can be certainly ascertained, the other is that the agreement has no relation to a real payment within the terms of the various authorities.

Now I have to consider (and I am afraid at some length) what the decisions are. I think they may be classed in this way. There is a series of decisions beginning—I do not say actually beginning, but beginning for this purpose—with *Astley* v. *Weldon* (1), which purports to be founded on older authority, and ending with the case in the Appeal Court of *In re Newman* (2), in which this has been determined—that where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the Court will not sever the stipulations. If any one of the stipulations is for the payment of the sum of money of less amount, then the proviso is bad. The ground of that doctrine I do not know. The ground stated by the Judges in two or three of the cases is this—they say it was an extension to the Common Law of the well-known doctrine of Equity. I do know a little of Equity, but I am sorry to say I cannot assent to the accuracy of the statement that it is an extension to the Common Law of the well-known doctrine. However that is the ground put by the Judges.

Another ground may be put. I do not find it put anywhere, but it may be put—and there are some expressions which though

(1) 2 B. & P. 346. (2) 4 Ch. D. 724.

I do not say they amount to what I am about to say tend that way; and that is the well-known doctrine that in the construction of written instruments you may depart from the literal meaning of the words, if reading the words literally leads to an absurdity. Now it may well be that the Courts thought that it was absurd to make a man pay a larger sum by reason of the non-payment of a smaller. It has always appeared to me that the doctrine of the English law as to non-payment of money—the general rule being that you cannot recover damages because it is not paid by a certain day, is not quite consistent with reason. A man may be utterly ruined by the non-payment of a sum of money on a given day, the damages may be enormous, and the other party may be wealthy. However that is our law. If however, it were not our law the absurdity would be apparent. I see no reason apart from our law why a man may not stipulate "You shall pay me £500 on a given day." It may be of almost vital importance to him. He may have to deposit it as security for the granting of concessions of enormous value, and the other party may know it. He may have to make a payment on a stamp for a most valuable patent, and the other party may know that he relies upon it. It is not unreasonable, as it appears to me, in those cases to say, "If you do not pay the £500, or it may be £50, on that date, you shall pay £5000 for the damage I shall sustain." There may be such cases, and many more cases besides those I have given as illustrations. However the decisions do go to that length. Many of them are old decisions, and one of them at least is the decision of the Court of Appeal; I think we are bound by them, and to that extent, therefore, they govern any case of the same kind.

The next class of cases is this. It is a class of cases in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will in all human probability be small —that is, where it is not absolutely necessary that they should be small; but it is so near to a necessity, having regard to the probabilities of the case, that the Court will presume it to be so.

Then the question is whether in that class of cases the same rule applies? Now, upon this there is no decision. There are a great many *dicta* upon the question, and a great many *dicta* on

C. A. 1882 WALLIS v. SMITH. Jessel, M.R.

each side. I do not think it is necessary to express a final opinion in this case, but I do say this, that the Court is not bound by the *dicta* on either side, and the case is open to discussion. It is within the principle, if principle it be, of a larger sum being a penalty for non-payment of a smaller sum; but at the same time, it is also within another class of cases to which I am now going to call attention.

The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are *dicta* there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance the sum has always been treated as liquidated damages.

I now come to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the Judges have held that this rule does not apply, and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases.

If, therefore, we apply these rules to the present case, the result will be this—that according to my construction of the contract there is no ascertainable definite sum of a less amount than the sum named payable within it, as a single condition, and consequently the decisions on that point do not apply: nor is it (because the words are "substantial breach") a case in which one or more of the stipulations can be treated as trifling or of trifling importance; therefore those *dicta* to which I have referred do not apply. It is a case in which the stipulations vary in importance, but as the breach must be substantial and as the amount of damages would therefore be substantial also, I think that the decisions apply which say that in those cases the sum stipulated is liquidated damages. Lastly, as I said before, those rules do not apply to deposits.

C. A. 1882 WALLIS v. SMITH. Jessel, M.R.

I will now go very shortly through the cases to shew that they do really amount to what I say. The first case is *Astley* v. *Weldon* (1). I need not state the facts of the case. In that case a larger sum was mentioned as penalty or damages for the non-payment of the smaller, one of the sums being a payment of £1 11*s.* 6*d.* a week, and the sum for damages £200. The decision was that the sum could not be treated as liquidated damages but as penalty. The ground of the decision is put by Lord *Eldon*, who was then Lord Chief Justice of the Common Pleas, in these words: "What was urged in the course of the argument has ever appeared to me to be the clearest principle, viz., that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument in case the act intended to be prohibited be done, that sum shall be construed to be a penalty." Now "certain damage" is used there by Lord *Eldon* having regard to English law, that by English law the non-payment of the sum at a given day as a general rule was merely the amount to be paid. There were certain cases under commercial law where it also included interest, but that was all. Therefore it is certain damage, because that is the English law, and the principle is that if a certain damage occurs that sum is made payable on the face of it. That he states to be the principle. It is a very limited principle. Then he goes on to another doctrine, which, as he was familiar with Equity law he does not state as Equity. He says (2): "A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive considered as liquidated damages it shall be taken to be a penalty, though agreed to be paid in the form of contract." Then he goes on to say: "With respect to the case of *Hardy* v. *Martin* (3), I do not understand why one brandy merchant who purchases the lease and goodwill of a shop from another may not make it a matter of agreement that if the vendor trade in brandy within a certain distance he shall pay £600; and why the party violating such agreement should not be bound to pay the sum agreed for, though if such

(1) 2 B. & P. 346, 350. (2) 2 B. & P. 353.
(3) 1 Bro. C. C. 419, n.

C. A. 1882 WALLIS v. SMITH. Jessel, M.R.

agreement be entered into in the form of a bond with a penalty it may perhaps make a difference." He does not forget the statute of *William* III. Then he goes into the case itself, and shews that the breach might be £1 11*s.* 6*d.* a week, but of course would make the defendant liable for £200. That is the whole substance of the judgment of Lord *Eldon*. He perfectly well knew that whatever had been the doctrine of Equity at one time, it was not then the doctrine of Equity to give relief on the ground that agreements were oppressive where the parties were of full age and at arm's length. It is very likely, and I believe it is true historically, that the doctrine of Equity did arise from a general notion that these acts were oppressive. At all events, long before his time it had been well settled in Equity that Equity did relieve from forfeiture for non-payment of money, and I think I may say, in modern times, from nothing else. There were old cases extending to relief from all sorts of things. The non-payment of money might be the non-payment of £1 on a given day as relief against a penalty, or it might be a forfeiture for a condition broken in the case of a mortgage, or it might be the non-payment of money in the case of purchase, or it might be the non-payment of money in the case of rent with a proviso for re-entry.

Now we come to the next judgment in the same case, which is the first instance of a *dictum* of a different character. Mr. Justice *Heath* says this: "It is very difficult to lay down any general principle in cases of this kind, but I think there is one which may be safely stated. Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance that must be considered as a penalty." That cannot be right, because it would include covenants for the performance of several things of equal value. I am not at all certain that Mr. Justice *Heath* intended to lay down any such general proposition. Then he goes to the rule. "It is a well-known rule in Equity that if a mortgage covenant be to pay £5 per cent., and if the interest be paid on certain days, then to be reduced to £4 per cent. the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay £4 per cent. and if the party do not pay at a certain time, it shall be raised to £5 per cent.,

then the Court of Chancery will relieve." It was settled so early as that; I am sorry it was so settled, because anything more irrational than the doctrine I think can hardly be stated. It entirely depended on form and not on substance. Then Mr. Justice *Rooke* says: "The determination of the Court in construing this instrument must be guided by the intention of the parties. Now it appears very clearly from the stipulation that small sums of money should be paid in certain cases, that the parties considered the larger sum as a penalty." He confines his judgment therefore to the same point as Lord *Eldon*, and so does Mr. Justice *Chambre* the remaining Judge. "There is one case in which the sum agreed for must always be considered as a penalty; and that is where the payment of a smaller sum is secured by a larger." Then he goes on to say you cannot sever the covenants, and so forth.

I have gone into that case rather minutely because it is, I may say, the foundation of the subsequent cases on the subject. The next case, which is one of the greatest importance, is the case of *Kemble* v. *Farren* (1), which has always been treated as a leading authority on the subject. I will not give a very positive opinion as to what the whole of that judgment means. I say so because very eminent Judges have taken very different views of the judgment, and therefore I suppose it is more ambiguous than it appears to me to be. But one thing is clear, that Chief Justice *Tindal*, in giving the opinion of the full Court, put an end, if I may say so, to any such doctrine as was shadowed forth by Mr. Justice *Heath* in the case I have just cited. He says (2) this: "And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000. For we see nothing illegal or unreasonable in the parties by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases such an agreement fixes that which is almost impossible to be accurately ascertained: and in all cases it saves the expense and difficulty of bringing witnesses to that point." Now that is conclusive on the general doctrine; that is, it was the

(1) 6 Bing. 141. (2) 6 Bing. 148.

C. A. 1882 WALLIS v. SMITH. Jessel, M R.

opinion of the full Court of Common Pleas that if the claims were limited to breaches of uncertain nature and amount, the sum mentioned would not be treated as a penalty. Then he goes on to say: "If therefore on the one hand the Plaintiff had neglected to make a single payment of £3 6*s.* 8*d.* a day, or on the other hand the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case would have given the stipulated damages of £1000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavoured to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

Now those latter words only apply to the case mentioned of a smaller sum not being paid and an agreement to pay a larger on the non-payment, they do not apply to the question of minute breaches of regulations; and then there are some words which I need not read. It appears to me to bring the case, simply as regards the judgment, to the same result entirely as in the previous case, and no more. He says, "Here," that is in *Astley* v. *Weldon* (1), "there was a distinct agreement that the sum stipulated should be liquidated and ascertained damages. There were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments. The action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court that for this very reason it would be absurd for the Court to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it."

It appears to me that rightly read *Kemble* v. *Farren* (2) does not

(1) 2 B. & P. 346. (2) 6 Bing. 141.

go beyond *Astley* v. *Weldon* (1). I say so with some hesitation, because I know there has been a difference between eminent Judges as to whether or not the sentence I read about the breach of minute regulations was not intended to apply to the whole of the judgment, and to say this, that where it is manifest that the damages must be minute, the same consideration applies as when the damages are ascertained at a certain sum.

The authorities are so numerous that I am afraid to go through them at any length, but I must call attention to two cases which are rather important. In the first place there is *Reynolds* v. *Bridge* (2), where ~~Lord Chief~~ Justice *Coleridge* says (3), "In *Astley* v. *Weldon* Lord *Eldon* distinctly laid down that the mere magnitude of the sum named could not prevent it from being liquidated damages. Another rule has been suggested, that where the sum is to be paid for the breach of an agreement comprehending more than one stipulation, it shall not be taken for liquidated damages. That is certainly found in some cases; but it cannot be said to be law now." That is very emphatic, and is entirely contrary to Mr. Justice *Heath's* dictum, if he intended it to be read as it stands. Then he refers to the case of *Atkyns* v. *Kinnier* (4), which is an important case, in which Lord *Wensleydale* commented on *Kemble* v. *Farren* (5), and then he goes on to say: "The principle seems to be that if you find a covenant the breach of which will occasion a damage, not uncertain, but such as is capable of being ascertained, as where there is a particular sum to be paid which is much less than the sum named as payable upon the breach, there it is held that the last named sum is specified by way of penalty because a Court of Equity would limit the amount to be actually paid. Then comes the case where there are several provisions, the breach of some of which will produce an ascertainable damage, but the breach of others an uncertain damage. In that case (though we do not require to determine it now), inasmuch as there is one provision in respect of which the sum named cannot be taken as liquidated damages, it cannot be so taken for any provision, for if it could, the con-

(1) 2 B. & P. 346.
(2) 6 E. & B. 528. 2 Jur N S 1164
(3) 6 E. & B. 540. 2 Jur N S 1167
(4) 4 Ex. 776.
(5) 6 Bing. 141.

C. A. 1882 WALLIS v. SMITH. Jessel, M.R.

tract would mean liquidated damages in one case and not in another. If you look in the judgment of Chief Justice *Tindal* and Mr. Baron *Parke*, they seem rather to contemplate the case where all the provisions are of one kind. Mr. Baron *Parke*, says: 'If there be a contract consisting of one or more stipulations, the breach of which,' meaning, I think, of each of which, 'cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages, not a penalty. On this principle, if there were no more in the covenant than what I have read, this would be clearly a case of liquidated damages.'"

There is a *dictum* of Lord Chief Justice *Coleridge* in *Magee* v. *Lavell* (1). He says: "The general principle of law appears to me to be where a contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." That is a *dictum* which is not supported by any decision, and it appears to me to be quite irreconcilable with principle. It is exactly opposed to what Lord Chief Justice *Tindal* says in *Kemble* v. *Farren* (2). The mere fact of the stipulations varying in importance cannot shew that the parties did not fix a sum where the damage is not ascertainable, but I am bound to say that though that is my opinion, and that I should have thought it was quite clear, I find that in the case of *In re Newman* (3), a decision of the Court of Appeal, that *dictum* is approved of. In the first place, Lord Justice *James* says: "The authority of *Kemble* v. *Farren* cannot be considered as having been in any degree nibbled away by those cases before Lord *Wensleydale* which have been referred to, and which, it is said, shew that the principle of *Kemble* v. *Farren* is to be confined to a case in which, amongst other stipulations, there was one stipulation for the payment of a sum of money. That was not the *ratio decidendi* of *Kemble* v. *Farren*, in which it was laid down in broad terms that wherever there is a sum mentioned at the end of a contract as damages for the non-performance of any of a great number of stipulations, there it must be treated as a penalty." With the greatest respect to Lord Justice *James*, it

(1) Law Rep. 9 C. P. 107, 111. (2) 6 Bing. 141.
(3) 4 Ch. D. 724, 731.

appears to me that the very contrary was laid down in express terms. There is some mistake about it, that is all I can say. Then he refers to the decision of Mr. Justice *Heath* in *Astley* v. *Weldon* (1), which was overruled, and which was obviously, in my opinion, wrong. As regards *Magee* v. *Lavell* (2) I have this observation to make—it was only a *dictum* during the argument by Lord Chief Justice *Coleridge*. I distrust *dicta* in all cases, and especially *dicta* during argument. I must say, however, that in *In re Newman* (3) Lord Justice *Bramwell* intimated his agreement with it, although, as I have already said, there is not only no decision to be found laying down such a doctrine, but it is really opposed to several judgments, including the two I have cited. Lord Justice *Bramwell* himself refers to two cases: *Galsworthy* v. *Strutt* (4), and *Atkyns* v. *Kinnier* (5), which are decisions in favour of liquidated damages where there was more than one stipulation, so that we have not only *dicta* opposed to *dicta*, but we have decisions opposed to decisions. As I said before, although I wish to leave the question open where there are several stipulations, and one or more is or are of such a character that the damages must be small, I do not wish for a moment to abstain from stating my opinion that there is no such doctrine where there are several stipulations though they may not be of equal importance, or where there are several stipulations irrespective of importance, which is the doctrine laid down by Mr. Justice *Heath*, and apparently approved of by Lord Justice *James*. There is neither authority nor principle for any such doctrine, and I cannot see that it is established by any case which is binding on this Court. I am not one of those who think that a long course of judicial decision can be set aside by any other Court. As regards the doctrine of *Astley* v. *Weldon*, I think it is technically binding. There is not only the decision of the Court of Appeal, but there is also the decision of the Court of Exchequer. But independently of that, if I find a long course of decisions by inferior Courts acquiesced in, which have become part of the settled law, I do not think it is the province of the

(1) 2 B. & P. 346.
(2) Law Rep. 9 C. P. 107.
(3) 4 Ch. D. 724.
(4) 1 Ex. 659.
(5) 4 Ex. 776.

C. A. 1882 WALLIS v. SMITH. Jessel, M.R.

Appeal Court after a long course of time to interfere, because most contracts have been regulated by those decisions; but where that is not the case, where the *dicta* are as they are in this case, not only contradictory, but those *dicta* which are in favour of the Appellant are modern as compared with the older *dicta*, then I think it is not right to say that the law is settled by the Superior Courts. There is another consideration which always has weight with me. When the law is settled it gets into the text-books, which are a very considerable guidance to practitioners.

In the last edition of Mr. *Mayne's* valuable book on Damages (1) he cites the dicta of Mr. Justice *Heath*, and he says, "This however must be limited to cases where it is apparent that the parties could not have intended the entire sum to be the ascertained damages of any breach." So that he treats the law as settled just the other way; I do not cite that as an authority, I only cite it to shew that the law is not treated in the text-books as being settled, notwithstanding the dicta either of Mr. Justice *Heath* or of Mr. Justice *Chambre* as approved by Lord Justice *James*.

I think it necessary to say so much because I have always thought, and still think, that it is of the utmost importance as regards contracts between adults—persons not under disability, and at arm's length—that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions, but they are exceptions of a legislative character.

One notable exception in old times was the usury law, now repealed to prevent people bargaining as to the rate of interest they would pay for the loan of money. There have been many other laws in modern times, such as the Factory Acts, and the Mines Regulation Acts, and so on, but they are all statutes; Judges have no right to say that people shall not perform their contracts which they have entered into deliberately, and put a different meaning on the contracts from that which the parties intend. In this case we have a very striking illustration. The

(1) 3rd Ed. p. 128.

contract in question was most carefully prepared. The Plaintiff is or was a solicitor; the Defendant had the assistance of a solicitor and I am told also of counsel, but whether counsel presided at the final framing of the document, I am by no means certain, there being contradictory statements on that point. But it was a most deliberate and carefully drawn instrument, and one which I think ought to be construed according to the plain meaning of the words. I am glad to find that I do not feel myself compelled to decide contrary to what is the plain meaning of the terms by any of the decisions.

In my opinion the decision of Mr. Justice *Fry* is right and ought to be affirmed.

COTTON, L.J.:—

In this case what we have to decide is whether the Judge of the Court below was right in giving to the Plaintiff the sum of £5000 without reference to the damage he had in fact sustained. That depends on the question, what is the effect of the contract between the parties. The 25th clause is the important clause—the Court being of course assisted in the construction of it by the other clauses in the contract. The clause in its terms expressly says that the £5000 shall be paid by way of liquidated damages on any breach of the covenant contained in the contract, and in terms of course that means that it shall be taken as the sum which the parties have by the contract assessed as the damages to be paid, whatever may be the actual damage. But we are not at liberty to construe this without reference to the decided cases, and the question which we have to consider is whether having regard to the decided cases we ought to disregard the terms of this contract, and to say that although in terms it says the sum of £5000 shall be liquidated damages, it is to be looked upon as an agreement between the parties that that sum shall be a penalty, so that the real damage sustained is all that is to be recovered by the Plaintiff.

Now I think it is not for us now to inquire into or question whether the Courts were right originally in the decisions which have been so much commented on. There they are, and in my opinion it would be wrong for us to question those decisions or to

C. A. 1882 WALLIS v. SMITH. Cotton, L.J.

act, whatever our own views might be, contrary to that course of decision, even if they were not (as they are in some of the cases), decisions by a Court of Appeal of equal authority to ours, but I must say that I quite agree with the Master of the Rolls that the sounder view to take is this, to leave persons who are competent and under no disability to make their own contracts, and then to act on those contracts, whatever the true interpretation might be, without assuming on behalf of the Court, either of Law or Equity, to say, "This is unreasonable and we will make another and different contract between the parties. They did not mean what they have said in their contracts." But with regard to the present case there are decisions which lay down what the cases have frequently said are rules for the purpose of ascertaining what is the construction of the instrument, and in applying those one must look (and I think that is not immaterial in the present case) to the whole contract.

I need not enter into the question of those authorities which deal simply with the case where a sum has been mentioned as liquidated damages for the breach of one covenant. Here there are a number of covenants to which clause 25 applies, and in respect of the breach of which it is said that £5000 shall be liquidated damages. Now in what cases have the Courts said that in those circumstances you shall construe the words "liquidated damages," not what they mean—as a sum assessed between the parties—but only as a penal sum, leaving the real damages to be ascertained. Undoubtedly the authorities do say this, that when a stipulation applies to a breach of a number of covenants, and one of those is a covenant for the payment of a sum of money where the damage for the breach of it is according to English law capable of being actually defined, then where a sum is said to be liquidated damages the stipulation applies not distributively to the different covenants but equally to all, and you must hold that the sum cannot be damages assessed by the parties as in the case of a particular covenant with respect to which the damages are incapable of being ascertained and are by law fixed in a different way; but you must look upon it as a mere penalty, and ascertain when the breach occurs what is the damage sustained in respect of the particular breach. But in my opinion that does

not apply to the present case. The only case to which it could possibly apply would be to the non-payment of the sum of £500. But is that an act to which the 25th clause refers? In my opinion it is not. The £500 was according to the agreement to be paid on the exchange of the contracts, and therefore in construing this clause one must consider what would be the course which the parties expected would take place before the contracts became operative by being executed and being exchanged between the parties. When one finds that that £500 was to be paid down on the execution of the contracts, I think on the fair interpretation of this instrument we should say that the exchange of the contracts without that being done and the non-payment of it at that time, is not a breach contemplated, and coming within the fair construction of clause 25. But then it is said on behalf of the Appellant that although that is not so, the law authorizes us to say that where the condition applies to the breach of a number of covenants contained in the instrument, that will justify the Court in construing the instrument contrary to the words contained in it, or rather giving to those words a meaning contrary to their primary and ordinary signification. Now, there is no case where it has been held that the mere fact that there are a number of covenants to which the condition applies is sufficient to justify such a mode of construing it, and I do not see on what possible ground it should be held that if there are a number of covenants of equal importance, or at any rate of considerable importance, contained in the contract, and none of those are of such a nature that the damages arising from a breach can be accurately ascertained, the parties may not reasonably fix beforehand an ascertained sum for the purpose of saying what shall be the damages. It is said indeed (and there is a *dictum* no doubt to support it), that the Court will give to the expression "liquidated damages" a meaning other than its primary meaning, where the covenants to which the clause applies are of a varied nature—that is to say, where some of them are presumably of greater importance and some of less. No doubt there is a *dictum* of Lord Chief Justice *Coleridge*, which has been referred to, which favours that view, but in my opinion, there is certainly no case so decided, and in my opinion it would be

C. A. 1882 WALLIS v. SMITH. Cotton, L.J.

contrary to the principle of the decided cases. It is not sufficient, in my opinion, to say that the covenants to the breach of which this applies, are of varying importance. That may be so, but yet the parties may very reasonably come to the conclusion that they will agree between themselves that the sum mentioned shall be assessed between them as the damages in consequence of the breaches of those various covenants. Probably there may be an exception that where some of the covenants are of such a character that obviously the damage which can possibly arise from a breach in any way of that covenant would be very insignificant compared with the sum which has been fixed by the parties, there the Court will give the non-natural construction to the terms used by the parties. In my opinion that comes within the same principle as where the Courts have interfered where one of the covenants has been for payment of a sum of money where the damage is capable of being assessed accurately, and is very much below the sum mentioned. But such a case as that does not arise in my opinion in the present case, for reasons I shall presently state. The Court is not called upon to decide it now, but I must say for myself that I incline to saying that the cases do justify us by following them out to their reasonable conclusion in saying that in such a case where there are various covenants to the breach of which this clause applies, and some of them are of such a small nature that the damages will presumably be very small—obviously and necessarily must be small—then the Court, whatever language the parties may have used, will say, "This is not damage assessed for the breach of all these covenants, but upon the breach of any of them the real damage is the sum which ought to be paid, liquidated damages being looked upon as a penalty only." I think that was the way in which Lord Justice *Bramwell* in *In re Newman* (1) intended to deal with the case in which it has been said by Lord *Wensleydale* that the Court would only interfere where one covenant to which the clause referred was a covenant, the damages for breach of which were capable of being accurately fixed as a covenant for payment of money, and that in other cases the Court would not interfere. That, I think, was what Lord Justice *Bramwell* was meaning to refer to. Although there are

(1) 4 Ch. D. 724.

dicta of Judges that where the covenants are of varying importance the Court might treat the sum not as liquidated damages but as a penalty, I think, when fairly considered, they have reference to the cases which come under the exception to which I have referred, namely, where some of the covenants are of so unimportant a character, or relate to matters of so unimportant a character, that it would be unreasonable to suppose that the parties could have intended to have assessed a sum as liquidated damages for the breach of such trivial or unimportant covenants. I think the doctrine as I understand it is really laid down by Chief Justice *Tindal* in *Kemble* v. *Farren* (1). No doubt, the point to which I am referring did not actually arise, but I think one would be wrong in disregarding the opinion expressed by Judges, especially those of great learning, in deciding cases even although some of their expressions were not necessary or applicable to the case before them. They lay down the principle, even although in laying it down they may go (as possibly we are doing in the present case), beyond the exigencies of the case before them. The dictum is this (2): "In the present case, the clause is not so confined," that is to one particular point; "it extends to the breach of any stipulation by either party. If therefore, on the one hand, the Plaintiff had neglected to make a single payment of £3 6*s.* 8*d.* per day, or, on the other hand, the Defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms." He evidently considers that it would be unreasonable to hold that the large sum of £1000 had been agreed upon and assessed between the parties as damages to be recovered for the breach of the regulations of the theatre, however minute and unimportant. That really as I understand it, seems to contain the doctrine of the cases.

Now here can it be said that this clause refers to the breach of

(1) 6 Bing. 141. (2) 6 Bing. 148.

C. A. 1882 WALLIS v. SMITH. Cotton, L.J.

covenants of a minute or trivial character, or to covenants the damages for which must be, or obviously will be, small? In my opinion it cannot be so said. There was a contract to enter into a great speculation, and, of course, one knows that where land is laid out for building it is very important that there should be no delay if the public are taking to the property, and if there is a demand for houses. Then this 25th clause says that there must be a substantial breach. The clause as to the forfeiture or payment of the sum only applies if there is a substantial breach with reference to the demand by the public, or by failure to perform any of the provisions therein contained. In my opinion, if there are (and I do not think there are) clauses which could be said to be of such trivial importance that the damage arising from a breach would be unimportant, that clause as to a substantial breach prevents the exception which I have mentioned from arising in this case. We simply have a condition for payment of a sum of money applying to the breach of a number of covenants, and in my opinion neither the cases nor any fair deduction from the cases justify us in saying that in such a case the words "liquidated damages" are not to have their proper meaning as damages agreed between the parties.

But really we are considering cases which only are to give a canon of construction having regard to the whole of the provisions of the instrument, and I think there are provisions in this contract which are to be taken into consideration. For instance, I think that clause 8 is worthy of consideration. That is a provision that in a certain event the Plaintiff should pay a sum of £5000 liquidated damages. This is applicable to one event and to one event only, namely, not making out a good title. It could hardly be argued that in that case the £5000 was to be considered not as damages assessed by the parties, but as a mere penalty, and I think one might fairly have regard to that in considering the case.

In my opinion therefore, having regard to the cases and the contract, Mr. Justice *Fry* was right in not trying to ascertain what damage had been sustained by the Plaintiff, and in giving him an ascertained and fixed sum of £5000.

LINDLEY, L.J.:—

I also come to the same conclusion, though I need hardly say not without difficulty, because all the cases on this subject are cases of difficulty. The difficulty arises from this, that there are certain rules of law which when they apply prevent the Court from giving effect to the language used by the parties themselves, in which they have expressed what must be supposed to have been their intention at the time. However, those rules, so far as they are settled, have been followed, and the difficulty arises in exactly understanding them and understanding the principles upon which they rest. What we have to deal with here is clause 25 in this agreement, which I will not read again, but I will make one or two observations upon it. In the first place, the operation of the whole agreement is restricted by two clauses in it. It is restricted to a substantial breach—there must be a substantial breach. What that means perhaps is not very clear, but it means, I suppose, a breach of some importance, or a breach for which more than nominal damages—substantial damages—would be recoverable, but for the liquidated damages clause. The operation of the clause is further restricted by the proviso at the end, that the breach on the happening of which these damages are to be paid is not to be the consequence of misconstruction of the language or meaning of any of the provisions of the contract. Therefore in order that the clause may apply at all you must have, first of all, a substantial breach, and then a substantial breach not the consequence of a misconstruction of the meaning of the provisions of the contract. That limits the operation of the clause, and relieves us from the difficulty of considering what the proper mode would be of applying it to what I may call trivial or accidental or inadvertent breaches. They are swept out by the language of the clause itself, and to my mind that becomes important. The language of the clause and the intention of the parties are tolerably plain. The events are specified, and the £5000 is to be paid as liquidated damages; but notwithstanding that, the point arises whether this clause properly construed applies to the non-payment of the £500, part of the deposit money. Because, if on the true construction of this clause it does apply to the non-payment of the small sum of £500, then the doctrine of *Kemble* v.

C. A. 1882 WALLIS v. SMITH. Lindley, L.J.

Farren (1) would be directly applicable, as I understand it. Although at first I thought that was the true construction, I am satisfied on further consideration that it does not apply to the non-payment of that sum. The clause takes it for granted that that payment had been made, and it was never intended to apply to the non-payment of a sum which was to be contemporaneous with the execution of the document itself. I think, therefore, on the true construction of the agreement that the non-payment of £500 part of the deposit is not a substantial breach within this clause, even if it is a breach at all, which I doubt, having regard to the language of the clause. That difficulty being got rid of *Kemble* v. *Farren* ceases to be applicable, as I shall shew presently. The case is now reduced to this, that there is a stipulation as to payment by *Smith* to *Wallis* of the sum of £5000 by way of liquidated damages, upon any substantial breach by *Smith* of that agreement, and we have to consider whether this stipulation is to be treated as meaning what it says, or as meaning nothing at all or next to nothing.

In order to determine that we must look a little into the authorities. Now the authorities have been carefully examined by the Master of the Rolls, and there are only one or two to which I will advert, but they all seem to proceed on the principle that the object is to ascertain the intention of the parties. You are to ascertain the intention of the parties by what they said—that is plain enough—but you are to ascertain the intention of the parties not only by what they said but by what the Court sees to be the consequence, and by what the Court may or may not consider to be absurd or oppressive, or thought to be so in former times. Take the common case of a money bond. It meant what it said. Take the ordinary case of a covenant to pay £5000 if £500 was not paid by the day named, the parties meant what they said; but effect has long ceased to be given to what was intended. Whether relief was given on the theory of oppression, or on the theory that the parties could not have meant what they said—that it was too absurd—or whether relief was given by reason of the usury laws, I do not know—it is an antiquarian research which I have not prosecuted. But it has long been settled that

(1) 6 Bing. 141.

where a person agrees to pay a larger sum if he does not pay a small one, he does not mean what he says, and the contract is not to have the effect that one would suppose it was intended to have. When we come to look a little further we find at all events that that principle pervades a great number of the cases with regard to liquidated damages. With the single exception of the case I shall refer to presently, *Betts* v. *Burch* (1), I think that in all the cases which have been referred to—at all events all into which I have looked—in which large sums have been held to be a penalty as distinguished from liquidated damages, it has been stipulated that a large sum shall be paid amongst other things on non-payment of a smaller one. That was so in *In re Newman* (2). There £100 was to be paid in the event of the non-payment of £10 a week. Therefore these cases are brought within the principle that relief is given in the event of the stipulation for payment of a large sum in default of paying a smaller sum. The moment we arrive at the conclusion that the 25th clause does not apply to the £500 deposit, we are driven to the consideration of that class of cases in which the larger sum is to be paid on one or more breaches, and the amount of damages sustained is not mentioned in the contract, and cannot be ascertained.

Now, certainly, there are to be found in the books a great number of *dicta* which are to the effect that if the larger sum is stipulated to be paid in one of many events (I think there is one case which goes as far as that) then the larger sum is to be treated as penalty and not as liquidated damages. The *dicta* as found elsewhere are modified, to the effect that if a larger sum is to be paid in one or more of many events in which the damage can be seen to be small or trivial, the sum is to be treated as penalty and not as liquidated damages. But when I come to look at the cases I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of damages. The nearest approach to it is the case of *Betts* v. *Burch*, and I shall refer to that because it was decided by Lord Justice *Bramwell*, whose familiarity with this subject is unquestionable. In order to understand *Betts* v. *Burch* it is necessary to observe that the larger sum there, the

(1) 4 H. & N. 506. (2) 4 Ch. D. 724.

C. A. 1882 WALLIS v. SMITH. Lindley, L.J.

£50, would have been payable not only in the event of the non-payment of the whole but on non-payment of the last pound of the price, and the judgment of Baron *Martin* proceeds entirely upon this. The agreement was this. The plaintiff agreed to sell and the defendant to purchase the household furniture, fixtures, stock-in-trade, and effects in and upon the premises by valuation in the usual way; the goods to be valued and possession given on or before the 13th of October, 1858, and in the event of the plaintiff or defendant not complying with every particular set forth in the said agreement, the defaulter should forfeit and pay to the other party the sum of £50, and all expenses attending the same. Then Baron *Martin* says (1), and this is the *ratio decidendi*: "The plaintiff's counsel have established that the same construction must be put on the agreement for both parties. Now as that is so, it would follow, if the construction contended for on the part of the plaintiff were to prevail, that if a very small part of the price were unpaid the defaulter would be liable to the penalty of £50. The cases are too strong, and I am bound to say that this is a penalty." Taking the view of Baron *Martin*, the £50 would be payable even though £1 only might be unpaid in respect of the price, which would bring it within *Kemble* v. *Farren* (2) and that class of cases. One must bear that in mind in reading Baron *Bramwell's* judgment, and I think that if one does bear that in mind it will be seen that there is nothing which really conflicts with the view taken in *Kemble* v. *Farren*. I refer to that case the more because Baron *Bramwell* adopted it in the case of *Sparrow* v. *Paris* (3), in which he said that the larger sum was payable in one event and not in several; but in *Sparrow* v. *Paris* it was not necessary for him to discuss what would have been payable if the larger sum had been stipulated for in a different form. It was stipulated there to be paid in one event, and it was not necessary to consider how the case would have stood if it had been otherwise stipulated. In *In re Newman* (4) Lord Justice *Bramwell* takes the same view. There again, when one looks at the case, the £1000 was payable in the event of the non-payment of £10, which is again within *Kemble* v. *Farren* and that class of cases. I have adverted to this

(1) 4 H. & N. 509.
(2) 6 Bing. 141.
(3) 7 H. & N. 594.
(4) 4 Ch. D. 724.

more particularly, because Mr. Justice *Willes*, in the case of *Hinton* v. *Sparkes* (1) (which is one of the numerous cases which have been referred to), says this: "If this agreement had not contained the provision for forfeiture of the deposit on the purchaser's failure to fulfil his part of the contract, we should have been bound to follow the decision of the Court of Exchequer in *Betts* v. *Burch* (2). I for one should have done so for the reasons set out in the judgments of Barons *Martin* and *Bramwell*, which present as satisfactory and full a view of the cases and of the principles and reasoning applicable to them as is to be found in any book, or indeed in all the books put together, and I will not attempt to add anything to what is found to be there." We must look at the cases, therefore, with reference to the actual facts before the Court, and we must bear in mind that in *Betts* v. *Burch* the £50 was payable even although £1 was unpaid. I cannot find any case (and none has been cited) of penalty in which that element has not been found. In this case we cannot find that element at all unless it is the £500 deposit, which I have already dealt with. Here is a large sum stipulated to be paid in a variety of events. What the damages would be in any of these events is not to be found specified in the agreement, nor can we say that it must be necessarily small or trivial. Under the circumstances I cannot see my way to say that the clause is not to have the meaning which is the *primâ facie* meaning of the words used; in other words, I do not feel compelled by the decisions on penalty and liquidated damages, which are perplexing, to say that this is a case of what is called penalty, the practical effect of which is that the clause does not mean what it says. I am not driven to that, and I come to the conclusion that it does mean what it says, and that therefore the view taken by Mr. Justice *Fry* is right, and that the appeal must be dismissed.

Solicitors for Plaintiff: *Russell, Son, & Scott.*
Solicitor for Defendant: *G. H. Terrell.*

(1) Law Rep. 3 C. P. 161. (2) 4 H. & N. 506.

M. W.

C. A.
1882
FRY, J.
Jan. 31; *Feb.* 1, 7.
C. A.
May 3, 5, 6.

HURST *v.* HURST.

[1872 H. 245.]

Will—Forfeiture on Alienation—Acceleration of subsequent Limitations—Want of Parties—Suit in Equity for Legal Demand pending at Commencement of Judicature Act—Judicature Act, 1873, *s.* 22—*Rules of Court*, 1875, *Order* XVI., *r.* 13.

Specified freeholds and leaseholds were given by will to trustees upon trust to permit the rents to be received by *H.* for life, and after his death to convey to his children on their attaining twenty-one, with a proviso that if *H.* charged or incumbered the property, the gift to him should be absolutely forfeited, and that in such case the gift in favour of his children should at once take effect, and be acted upon by the trustees as thereinbefore directed. *H.* by a memorandum in writing, in 1869, charged his life estate in favour of *W.* *W.* shortly afterwards, on hearing of the clause of forfeiture, and before he had taken any benefit under the charge, repudiated the security and obtained another security from *H.* In 1874 the trustee of the will, by leave of the Court in an administration suit, filed a bill against persons who were in possession of the property under a title derived from a lessee of *H.*, to make them account for the rents. *H.* had no children.

Held, by *Fry*, J., and by the Court of Appeal, that the memorandum of charge produced a forfeiture of the life interest of *H.*, although *W.* had never claimed any benefit thereunder, and had afterwards disclaimed it, and although *H.* had no children, so that there were no persons to take under the gift over.

Held, by the Court of Appeal, that though the claim of the Plaintiff was a purely legal demand in respect of which a bill in equity could not formerly have been maintained, a decree could be made after the *Judicature Acts* came into operation, inasmuch as sect. 22 of the Act of 1873 provides that the Court shall have the same jurisdiction in pending suits as if they had been commenced in the High Court of Justice.

ISAAC HURST, by will dated the 23rd of September, 1867, gave his freeholds and leasehold property to his executors and trustees, viz., his wife the Defendant *A. Matilda Hurst* and the Plaintiff, upon trust to permit his daughter to receive the rents of certain freehold and leasehold hereditaments for her life for her separate use, and after her death upon trust to convey the same to her children as therein mentioned, and upon trust to permit his (the testator's) son, *Isaac Blackburn Hurst*, to receive the rents of certain specified freehold and leasehold hereditaments at

Greenwich for his own use during his life, and after his decease upon trust that his trustees should convey and assign the said hereditaments to the children of *Isaac B. Hurst* in equal shares absolutely, on their respectively attaining the age of twenty-one years; but in case any of the children should die before attaining that age, then upon further trust to convey and assign the shares or share of the children or child so dying under the age of twenty-one to the others or other of such children, and in case of his said son not having any issue, or in case none of his children should live to attain twenty-one, then he directed that the same property should be conveyed and assigned to and divided between such of the children of the testator's daughter as should live to attain twenty-one. And the testator gave and bequeathed to his wife, *Augusta Hurst*, so long as she should continue his widow, an annuity of £100 charged on his said freehold and leasehold property, one moiety thereof to be paid out of the rents of the property given to the daughter, and the other out of the rents of the property given to the son. And the will contained the following clause:—"And it is my will that the bequests hereinbefore made to my said son and daughter respectively shall be subject to the following conditions, that is to say, that they shall in no wise charge or incumber the said freehold or leasehold property the rents of which are receivable by them during their respective lives, or any part thereof. And in case either my said son or daughter shall so charge or incumber the said property, or any part thereof, or in case my said son should become bankrupt or insolvent or compound with his creditors, then the bequest to my said son or daughter so transgressing such conditions or in the case of the bankruptcy or insolvency of my said son as aforesaid, shall thereupon become absolutely forfeited. And it is my will that in either of such cases the trusts hereinbefore created in favour of the child or children of my said son or daughter so transgressing shall at once take effect, and be acted upon by my said executors and trustees as hereinbefore directed."

The testator gave the residue of his personal property to his wife, his son *Isaac Blackburn Hurst*, and his daughter equally, but did not make any devise of his residuary real estate.

The testator died in October, 1867.

C. A. 1882 HURST v. HURST.

On the 30th of September, 1869, *Isaac B. Hurst* executed a charge upon the life interest given to him by his father's will in favour of *Robert Ward*, by a memorandum prepared by *Ward* himself, and which, so far as material, was in the following words:—

"In consideration of £100 this day advanced to me by *Robert Ward*, secured by my note of hand, I hereby charge with the payment thereof all my interest and estate in the hereditaments at *Greenwich* given to me for life by the will of my father. And I also charge with the payment of the aforesaid sum a policy of insurance on my life for £500 in the *Provident Life Office*. My life interest in the said property is unincumbered, except an annuity of £50 to the widow of my father.

"(Signed.) *Isaac B. Hurst.*"

Ward advanced the £100 on the security of this memorandum, and gave notice of the assignment of the policy to the *Provident Life Office*, but a few weeks afterwards, becoming aware of the clause of forfeiture, he complained to *Isaac B. Hurst* and repudiated this security, of which he had never actually claimed the benefit except by giving the above notice. On the 5th of May, 1870, *Isaac B. Hurst* in lieu thereof assigned certain leaseholds to *Ward* by way of mortgage to secure all moneys due from him to *Ward*.

On the 23rd of November, 1872, a decree was made in a suit of *Hurst* v. *Hurst*, 1872, for carrying into execution the trusts of the will, and on the 4th of April, 1873, an order was made appointing a receiver.

The receiver found that the *Birkbeck Permanent Benefit Building Society* was in receipt of the rents and profits of the property given to *Isaac Blackburn Hurst* for life. On the 23rd of June, 1873, an order was made in the cause, giving liberty to the trustees of the testator's will to file a supplemental bill against the building society for an account of the rents of the property given to *Isaac Blackburn Hurst* for life, on the ground that he had no power to aliene the rents.

On the 24th of January, 1874, the Plaintiff accordingly filed a bill against Mrs. *Hurst*, *Isaac B. Hurst*, *Ward*, and the trustees of

the building society, alleging that the building society claimed an interest in the property under a charge or incumbrance created by *Isaac Hurst*. The Plaintiff alleged that the charge was ineffectual, except for the purpose of working a forfeiture, and asked for a declaration to that effect, for an injunction to restrain the trustees of the building society from receiving the rents, and for an account of rents received by them.

It turned out that the title of the building society was derived as follows: By indenture dated the 13th of July, 1870, *Isaac Blackburn Hurst* granted a lease of the property given to him for life by the will to *C. Sidgreaves* for twenty-one years, at the rent of £126. On the 26th of August, 1870, *Sidgreaves* mortgaged this leasehold interest by underlease to the trustees of the building society. *Sidgreaves* was made a party to the suit by amendment.

Ward on the 1st of May, 1874, put in an answer and disclaimer in which he stated as follows: "I have been advised that the effect of the charge of the 30th of September, 1869, was to produce a forfeiture of the life estate of *Isaac Blackburn Hurst*, and I say that I have not and do not claim to have any estate, right, or interest in or to the property specifically devised by the will of the testator in trust for *Isaac Blackburn Hurst* for his life, and that if applied to by the Plaintiff before suit I would have disclaimed, and I disclaim all right, title and interest, legal and equitable, in and to the last-mentioned property or any part thereof."

The trustees of the building society by their answer took the objection that the suit was for a legal demand, and therefore not maintainable.

Isaac B. Hurst was a bachelor.

The suit came on for hearing before Mr. Justice *Fry* on the 31st of January, 1882.

Cookson, Q.C., and *E. Beaumont*, for the Plaintiff:—

The life estate of *Isaac Blackburn Hurst* has become forfeited by the charge made to *Ward*: *Barnett* v. *Blake* (1). *Ward* can have no costs: *Talbot* v. *Kemshead* (2).

(1) 2 Dr. & Sm. 117. (2) 4 K. & J. 93.

C. A. 1882 HURST v. HURST.

J. Pearson, Q.C., and *W. W. Cooper*, for *Isaac Blackburn Hurst*:—

By the proviso in the will *Isaac B. Hurst* was restrained from charging his life estate; therefore the memorandum was inoperative, and the estate remains in him. There is no forfeiture, for *Ward* disclaimed all interest in the life estate of *Isaac Hurst* before he took any of the rents and profits. *Sheppard's* Touchstone, as cited in *Peacock* v. *Eastland* (1); *Townson* v. *Tickell* (2).

The case is similar to that of a bankruptcy annulled before anything has passed under it, in which case it does not operate as a forfeiture, though there is a proviso for forfeiture on bankruptcy: *Ancona* v. *Waddell* (3); *Trappes* v. *Meredith* (4); *Samuel* v. *Samuel* (5). The charge to *Ward* was a deed-poll not executed by *Ward*, and can therefore be avoided, and will not work forfeiture: *Cruise*, Dig. (6); *Peacock* v. *Eastland*.

Glasse, Q.C., and *Owen*, for the trustees of the building society.

W. W. Karslake, Q.C., and *Yate Lee*, for *Ward*.

[FRY, J. suggested whether there could be any forfeiture of the life interest under the proviso in the will, inasmuch as the gift over in case of forfeiture was to a class which could not be ascertained until the death of *Isaac*.]

Cookson, in reply:—

The intention of the testator was that there should be cesser if *Isaac Hurst* tried to incumber: *Rochford* v. *Hackman* (7); *Manning* v. *Chambers* (8); *Trappes* v. *Meredith* (9).

FRY, J.:—

The testator in this action made his will in September, 1867, and died in the following month. By such will he bestowed a certain

(1) Law Rep. 10 Eq. 17, 20.
(2) 3 B. & A. 31.
(3) 10 Ch. D. 157.
(4) Law Rep. 9 Eq. 229; S. C. on appeal, Law Rep. 7 Ch. 248.
(5) 12 Ch. D. 152.
(6) Vol. iv. p. 404.
(7) 9 Hare, 475, 480.
(8) 1 De G. & Sm. 282.
(9) Law Rep. 7 Ch. 248.

benefit upon his son, the Defendant *Isaac B. Hurst*, the nature of which I shall presently refer to, and on the 30th of September, 1869, the Defendant *Isaac B. Hurst* executed a charge upon the life-interest given to him by the will and also upon a certain policy of assurance in favour of the Defendant *Ward*. He subsequently created a charge in May, 1870, on his share of the residuary property of the testator.

Several questions arise in this case, the first of which is one of construction. This question was not fully argued during the course of the discussion and therefore I reserved my judgment. The testator in the first place bequeathed to certain trustees the whole of his freehold and leasehold property. He directed them to permit and suffer the Defendant *Isaac B. Hurst* to collect and receive the rents during his life, and after his decease he declared that his trustees should convey and assign the said hereditaments to the children of his son *Isaac* in equal shares absolutely on their respectively attaining the age of twenty-one years, but in case any of the children of his said son should die before attaining that age then he created a further trust to convey and assign the share or shares of the children so dying under twenty-one to the other or others of such children. Now I pause here to observe that that is a trust which could not be carried into effect during the lifetime of the son, because the trusts are to convey a certain aliquot share of the properties to each of his children, and it is impossible to ascertain even the minimum share of the child until the death of the son, because of course he might have children born at any time during his life, and consequently the smallest share to be taken by any child could not be ascertained until that class was closed, although of course the share might be increased by the death of any child of the son under twenty-one.

[His Lordship then read the proviso in the will by which, if the son charged or incumbered the property devised to him for life, the bequest was to be absolutely forfeited, and proceeded as follows:—]

Here I observe that according to the case of *Rochford* v. *Hackman* (1) that clause, supposing the event happened, would be operative as a clause of cesser, although there might be no gift

(1) 9 Hare, 475.

C. A. 1882 HURST v. HURST. Fry, J.

over. But the testator went on to provide and declare "that in such case the trust hereinbefore created in favour of the children of my son so transgressing shall at once take effect and be acted upon by my trustees as hereinbefore directed."

Such a trust seems to me incapable of being performed during the lifetime of the son, because it is a trust to convey certain aliquot shares to the children of that son, and those children might either not be in existence, or the respective interests of those children if they were in existence could not be ascertained. And I cannot construe it as a trust to convey to the children of the son living at the time of the cesser of the previous estate, because the testator is explicit that the trusts which are then to be carried into effect are the trusts "hereinbefore created," and they are to be carried into effect "as hereinbefore directed," express words which, in my judgment, exclude the possibility of making so great a change as ascertaining the class of children at a time when there might be no children, or when there might be only some one child born who might ultimately be a child not entitled to take. No disposition can well be more different than a provision for the family of a son to be determined at the time of his death, and a provision for the family of a son to be ascertained when he might make a charge.

Then arises this question: is the clause of cesser to be read as taking effect upon the execution of the charge, or upon the execution of the charge co-incidently with the taking effect of the gift over. If it be the former, it would be in my judgment good, if the latter, then it would be clearly bad; because one of the two events is impossible in its nature. If the question had been open, I should have thought there was strong reason for holding that the true meaning of the testator was that the estate was to cease only in the event of the charge and the gift over taking effect co-incidently. But the question appears to be precluded by the authority of *Doe* v. *Eyre* (1). There the tenant of a copyhold estate, a married woman, in pursuance of a power of appointment given to her by her marriage settlement, appointed the estate in favour of two of her sons who were objects of the power, and declared that in case neither of her said two sons should

(1) 3 C. B. 557; 5 C. B. 713.

be living at the decease of her husband, then she appointed the copyhold messuage to her father-in-law, who was not an object of the power. And the question, therefore, was raised whether the gift over was good so far as it operated as a cesser of the previous estate, although bad as a gift to the father-in-law; and it was held to be good. Baron *Parke*, in affirming the Court of Common Pleas, said (1), "We are of opinion that in the event which has happened, this estate was put an end to" (that was the estate of the son), ... "The learned counsel contended that where there is an estate in fee liable to be defeated on a condition subsequent, and that condition either originally was, or by matter subsequent became, impossible to be performed, the defeasible estate was made absolute, and he cited *Co. Litt.* (2). Of this there is no doubt; the principle is applicable to this case if the condition was impossible. But the question is what was the condition by which the testatrix meant the estate to be defeated. Was it if the two sons should die in the father's lifetime, or was it if they so died and if the estate should also by law vest in the father-in-law. . . . This question is not peculiar to cases of appointments under powers; it might arise upon an ordinary will. If a testator were to devise to *A. B.* in fee, and to direct that in the event of *A. B.* dying in the lifetime of *J. S.* the estate should go over to a charity, it surely is perfectly clear that if *A. B.* died in the lifetime of *J. S.*, he *A. B.*, or rather his heirs, would lose the estate. The testator could not give to the charity without taking away from the devisee. The testator, therefore, in such a case by his will says: 'If *A. B.* dies in the lifetime of *J. S.* I do not mean that *A. B.* or his heirs should any longer have the estate.' The estate of *A. B.* is in such case defeated, not by the giving over of the estate to the charity, but by the happening of the event on which the testator intended it should go over."

That case came to be considered by Vice-Chancellor *Kindersley* in the case of *Robinson* v. *Wood* (3), where a testatrix having real estate bequeathed it to her daughter and if she should die under twenty-one without issue then upon trust to sell the property and to pay the proceeds to a charity. It was exactly the case

(1) 5 C. B. 746. (2) Page 206a.
(3) 27 L. J. (Ch.) 726.

C. A. 1882 HURST v. HURST. Fry, J.

contemplated by Lord *Wensleydale* in delivering judgment in the case in the Exchequer Chamber. Vice-Chancellor *Kindersley* feeling the same difficulty which I have not concealed in the present case, said (1): "It has been argued that the entire gift over being void there is nothing to divest the estate from the original taker, and I confess that I have much difficulty in getting over that reasoning, but I find that the precise question has been brought before the Court of Common Pleas and the Court of Exchequer, and it has been held that where there is a gift over purporting to divest a prior estate in fee simple if the devise over fails for any reason, the intention of the testator must be taken to have been that the devise should nevertheless operate to carry the estate over. Now, whatever opinion I may entertain upon the point it is not for me in the exercise of my functions to overturn that decision." In that view of the Vice-Chancellor I coincide, and whatever doubts I might have felt if the matter had been *res integra*, I hold that this case is really governed by the decision to which I have referred of *Doe* v. *Eyre* (2), and therefore I conclude that although the gift over was incapable of taking effect, the forfeiture may take effect.

The next question arises in this way. It has been contended that although the instrument of the 30th of September, 1869, was in terms a charge upon the estate and interest of *Hurst*, the son, in these hereditaments, yet that as the estate was determined by the charge, it could never operate at all, and so was no valid charge. That argument, if it is to prevail, leads to a very curious conclusion; because if there be no charge (as is the argument), then the estate remains and the charge is good. But then if the charge exist, the estate is gone, and so we are involved in a hopeless circle: which reminds one of the puzzle about *Epimenides* and the *Cretans*. But looking at the matter a little more carefully it is obvious that no such difficulty really arises, because the forfeiture, if it took effect at all, is the effect of the charge, is the result of the charge, is the consequence of the charge, and to hold that an effect, or a result, or a consequence, prevents the cause or antecedent, not from continuing to exist, but from ever having existed, is clearly an absurdity. The forfeiture does not

(1) 27 L. J. (Ch.) 728. (2) 3 C. B. 557; 5 C. B. 713.

destroy the charge, but is only the consequence of the charge. That argument therefore cannot prevail.

Again, the practical conclusion which was pressed upon me seems to me to be absurd, because it would be to hold that according to English law a man may have an estate and be incapable of alienating or charging it, which is not the law of *England*. Again, the testator contemplated a charge as being a thing which was possible, and therefore I must put upon the words a construction which shall express a possible event, which it would not be if that argument was sound; and, lastly, if any authority were necessary, the case of *Barnett* v. *Blake* (1), before Vice-Chancellor *Kindersley*, shews that upon words of this description the word "charge" may be read as meaning "attempt to charge." That argument therefore also fails.

In the next place it was contended that Mr. *Ward* having by his answer disclaimed any interest in this property, that disclaimer operated *ab initio*, and prevented the charge ever having had any effect. That argument in my judgment is unfounded, and for this reason, that a disclaimer can only operate *ab initio* when there has been no assent given to the instrument:—and no person after having consented to an instrument can disclaim so as to prevent the estate vesting. In the present instance it is plain that Mr. *Ward* did assent to the instrument of the 30th of September, and that he is at the present moment claiming under it. He prepared the instrument himself. Subsequently to its execution, and on the faith of it, he paid £100 to Mr. *Hurst*. He gave notice to the insurance company of his charge upon the policy. He retained the property, and he still, as I understand, is making the claim upon the policy. He has disclaimed in this action for the purpose of saying he does not desire to have any relief given to him in respect of the property being administered, but that is very different from saying that he never has claimed under the instrument.

Lastly, it was contended that the decisions, of which *Samuel* v. *Samuel* (2) is perhaps the most recent example, have established a principle which would apply to this case, and that although Mr. *Ward* did claim for awhile under the instrument, yet that he

(1) 2 Dr. & Sm. 117. (2) 12 Ch. D. 152.

C. A. 1882 HURST v. HURST. Fry, J.

disclaimed or got rid of the instrument before any operation was given to it, and consequently that the forfeiture never has taken effect.

The true principle established by the cases to which I have referred, so far as they are applicable to the present case, appears to me to be this, that if a charge or a bankruptcy, or any other impediment to the personal reception of the income has been created, but has been validly extinguished before the period of distribution or the period at which the right to receive any portion of the money has accrued, there is no forfeiture. That principle however does not apply in the present case, and for two reasons. In the first place, there has been no extinction whatever of Mr. *Ward's* rights under the instrument until he disclaimed in this action. And in the next place, the fortnight or three weeks which it was conceded according to the argument this instrument was in force was a fortnight or three weeks during which Mr. *Hurst* had an actual right to the reception of the rents and profits. There was nothing whatever to prevent that claim operating during the time during which according to the argument it was in force. That argument, therefore, also fails.

In the result I hold that the clause of cesser has taken effect, and I shall declare that on the execution by the Defendant *Isaac B. Hurst* of the deed of the 30th of September, 1869, his estate in the hereditaments the rents whereof were under the will receivable by him during his life subject to certain conditions in the will mentioned, ceased.

His Lordship, however, being of opinion that the proper parties were not before the Court to enable him to determine to whom the rents belonged, dismissed the bill against *Isaac B. Hurst* and *Ward* without costs, and as against the trustees of the building society with costs. Leave was given to strike out the name of *Sidgreaves* as a Defendant, and the suit was declared to be supplemental to the former suit of *Hurst* v. *Hurst*.

C. W. C.

C. A.

The Plaintiff appealed. It was admitted on the appeal that *Isaac Blackburn Hurst* was the heir-at-law of the testator.

The appeal came on to be heard on the 3rd of May, 1882.

Cookson, Q.C., and *E. Beaumont*, for the Appellant:—

We submit that the bill ought not to have been dismissed, but the title to the rents decided.

[JESSEL, M.R.:—The bill ought certainly not to have been dismissed for want of parties, for parties can be added at any time before final judgment: Order XVI., r. 13. But is not this a bill filed for a mere legal demand before the *Judicature Act* came into operation.]

That does not prevent the Court from making a decree after the Act came into operation, the suit being pending at that time: *Judicature Act*, 1873, sect. 22: *Vagg* v. *Shippey* (1).

[The Court then intimated that the case might proceed, leaving the Respondents to argue this point further.]

It being admitted that *Isaac Blackburn Hurst* was heir-at-law, and there being no residuary devise, we cannot claim the rents against his disposition of them, but we are entitled to an account of the rents of the leaseholds. *Ward's* disclaimer could not prevent the security which he once accepted from being a forfeiture, and the objection that there are no children *in esse* to take under the gift over does not prevent a forfeiture. *Doe* v. *Eyre* (2) is decisive on this point, and is a decision of a Court of Appeal.

Glasse, Q.C., and *Owen*, for the trustees of the building society:—

Assuming the transaction with *Ward* to produce a forfeiture, we must in order to ascertain its effect read the clause of forfeiture and the gift over in connection with each other. The forfeiture is not a general forfeiture, but forfeiture for a particular purpose—that of giving the property at once to the son's children. Where the Court can see that the testator had only a particular object in view in directing forfeiture, the forfeiture will not be held to be general. Mr. Justice *Fry* decided this case on the ground of *Doe* v. *Eyre* (3), followed in *Robinson* v. *Wood* (4) by

(1) 1 Charley's New Practice Cases, 8.
(2) 5 C. B. 713.
(3) 3 C. B. 557; 5 C. B. 713.
(4) 27 L.J. (Ch.) 726.

C. A. 1882 HURST v. HURST.

Vice-Chancellor *Kindersley*, though he did not approve of it. Neither did Mr. Justice *Fry*, but he considered himself bound by it.

[JESSEL, M.R.:—Have you any authority deciding that when there is a clause of forfeiture followed by a clause of acceleration, the forfeiture is confined to the case provided for by the other clause?]

Jackson v. *Noble* (1) is such an authority.

[JESSEL, M.R.:—The key to the decision there is found on p. 596, it turned on the construction of particular words in that will, and lays down no general principle.]

This case is distinguished from *Doe* v. *Eyre* (2), and *Robinson* v. *Wood* (3). In those cases though the gift over was void, there was a clear expression of intention that in the events which happened the first taker should not keep the property. Here it is a question of construction whether the property was meant to go over unless there were children to take it: *Jarman* on Wills (4). The case where a gift over is only prevented by law from taking effect is quite different. The intention there is manifest that the first taker shall lose the property. The clause of forfeiture and the gift over are to be read in connection with each other: *Hodgson* v. *Halford* (5).

[JESSEL, M.R.:—Is there any case where if land is devised to *A. B.* in fee, and if he dies without issue living at his death, then to a charity, he has been held to keep the estate, though he dies without leaving issue?]

The case does not appear to have occurred.

[JESSEL, M.R.:—In *Doe* v. *Eyre* a gift over in an event which happened to a person not capable of taking, was held to defeat the estate. Here you have the direct expressions of intention that the devisee is to lose the estate.]

But we say there never was any forfeiture at all, for *Ward* never claimed any interest in this property.

(1) 2 Keen, 590.
(2) 5 C. B. 713.
(3) 27 L. J. (Ch.) 726.
(4) 3rd Ed. vol. i. p. 824; 4th Ed. vol. i. p. 867.
(5) 11 Ch. D. 959.

[JESSEL, M.R.:—If a mortgagee advances money and takes a mortgage he cannot afterwards be heard to say that he did not accept the estate, and if he once accepts it the estate has passed, and no subsequent disclaimer has any effect.]

Samuel v. *Samuel* (1) is against forfeiture.

Then as to the point that the action was brought in the wrong Court we say that the object of the 22nd and 23rd sections of the *Judicature Act*, 1873, is to transfer the pleadings to the Chancery Division in the state in which they were when the Act came into operation, and subject to all infirmities to which they were then subject. Suppose a bill filed in Chancery for a purely legal demand and a demurrer put in before the Act came into operation, could the demurrer be overruled because of the Act?

[JESSEL, M.R.:—I should say it certainly could. Suppose an Act had been passed saying that the Lord Chancellor and Vice-Chancellors shall have the powers of a Court of Common Law, and that proceedings pending when the Act came into operation should be treated as if commenced after it. How could the demurrer be sustained?]

We submit that such is not the purview of the Act in question. This is a mere ejectment bill, and the objection was taken by answer before the Act came into operation. *Vagg* v. *Shippey* (2) does not govern the case, for there the bill was amended after the Act came into operation, a demurrer having previously been allowed. There was, therefore, a new point of departure. Sect. 22 shews no intention that the rights of the parties as they stood when the Act came into operation should be altered. Suppose an ejectment bill was brought in Chancery, and before the *Judicature Act* came into operation the *Statute of Limitations* had run. Is the person in possession to be deprived of the right acquired under the statute?

[JESSEL, M.R.:—I think that he does lose the right which he would have had apart from the *Judicature Act*, and I see no hardship in it. The object of the *Statute of Limitations* was to protect people from stale demands, and if the demand was made in due

(1) 12 Ch. D. 152.
(2) 1 Charley's New Practice Cases, 8.

C. A. 1882

HURST v. HURST.

time there is no injustice done by taking away the defence that it was made in the wrong Court.]

W. W. Cooper, for *Isaac Blackburn Hurst.*

Cookson, in reply.

JESSEL, M.R.:—

The result of this appeal is curious. It gives a benefit to the principal Defendants by establishing their title to the rents of the freeholds, and to the Plaintiff by establishing his title to the rents of the leaseholds. Owing to some oversight the attention of Mr. Justice *Fry* was not called to the fact that part of the property was leasehold. As regards the freeholds it was not admitted before him, but has been admitted before us, that *Isaac Blackburn Hurst* was the testator's heir-at-law, and we have come to the conclusion that as to the freeholds the bill must remain dismissed, on the ground that the Plaintiff has no title; but the statement of opinion that proper parties are not before the Court to enable the Court to determine to whom the rents belong must be struck out of the decree.

The first point argued was whether there was a forfeiture. This turns on a very simple matter. *Isaac Blackburn Hurst* borrowed money from *Ward*, and gave him a memorandum in these terms: "In consideration of £100 this day advanced to me by *Robert Ward*, secured by my note of hand, I hereby charge with the payment thereof all my interest and estate in the hereditaments at *Greenwich* given to me for life by the will of my father." Now the condition of the will is that the devisees for life shall not "charge or incumber" their interests. The document I have read clearly creates a charge. It is said that *Ward* never made a claim under this charge, but renounced the benefit of it. It is not necessary that he should make a claim under it; he in the first instance accepted it, and a disclaimer after acceptance is ineffectual. When he discovered the forfeiture clause he complained that he had been cheated, and obtained some other security instead of the original one; but that giving up the charge does not make it any the less a charge.

C. A. 1882 HURST v. HURST. Jessel, M.R.

But it is said that, assuming *Isaac B. Hurst* to have made a charge, the forfeiture clause never came into operation under the circumstances of this case. If the clause had ended with the first branch which declares the forfeiture there would have been no room for arguing that the forfeiture had not taken effect, but it is contended that as the second branch carries the estate to the children the forfeiture must be taken as only directed for the purpose of the gift to the children, and that as there were no children *in esse* the forfeiture did not take effect. This does not agree with the words of the will, which are that the bequest to the child transgressing the condition shall be "absolutely forfeited." The intention of these words is clear. There are cases in which it is plain that the original gift was not intended to be defeated unless there were objects to take under the gift over, as, for instance, in cases of substitutionary gifts to children; but here we have an intention separately declared that the gift is to be forfeited. Two intentions are expressed: first, to forfeit the life estate; secondly, to accelerate the gifts to the children of the tenant for life. If the forfeiture is expressly limited to take effect on the event mentioned in the first branch of the clause effect must be given to it, though there be nothing to be accelerated under the second branch, and in that case the residuary devisee, if there is one, and if not the heir-at-law, takes the forfeited interest. It is urged that there is no forfeiture because no child has been born. Suppose that afterwards a child is born, is the estate to go backwards and forwards according as there is or is not issue of the tenant for life? I am of opinion, then, that *Isaac Blackburn Hurst's* life estate was absolutely forfeited. In *Doe* v. *Eyre* (1) there was no clause of forfeiture independently of the gift over, and it was held that the fact that the gift over was void *ab initio* did not prevent the property from going away from the first taker. It was considered that there was sufficient indication of an intention that the property should so go away though the persons designated in the gift over could not take. That decision was followed by Vice-Chancellor *Kindersley* in *Robinson* v. *Wood* (2). It is a case which was decided in 1848 by a Court of co-ordinate jurisdiction with this, and is treated by the text-writers as settling the law:

(1) 5 C. B. 713. (2) 27 L. J. (Ch.) 726.

C. A. 1882 HURST v. HURST. Jessel, M.R.

Theobald on Wills (1); *Jarman* on Wills (2); *Sugden* on Powers (3); and if it is to be overruled it can only be by the House of Lords. *O'Mahoney* v. *Burdett* (4) tends in the same direction. In that case there was a gift over by will of personalty to a person who died in the testator's lifetime, so when the instrument came into operation it was impossible that the gift over could ever take effect in favour of the person intended to be benefited by it. It was held that on the happening of the event on which the gift over was to take effect the property went to the residuary legatee. That case was stronger than this, for here it was not at the death of the testator impossible for any one to take under the description in the gift over; and there is less reason for saying that the clause of forfeiture was not intended to operate.

There being then a forfeiture, what is the result? After forfeiture there is no gift during the life of *Isaac Hurst* which is now operative in favour of any one. We say nothing as to the rights of his children if he should ever have any; but at all events until a child is born the rents of the freeholds are undisposed of and go to the heir-at-law, as there is no residuary devise, and the dispositions made by *Isaac Blackburn Hurst*, under which the building society is in possession, are effectual.

As regards the leaseholds the case is different, for the will contains a residuary bequest, under which the executor holds the residue in trust for three people, and he has a right as legal owner to recover the rents for the benefit of his *cestuis que trust*. The Defendants who have received the rents are therefore liable to account to the Plaintiff as legal owner, making all just allowances. *Isaac Blackburn Hurst*, however, was entitled to one-third of them beneficially, and if that third is not wanted for costs the building society would be entitled to receive it back from the Plaintiff. I think, therefore, that it will not be right to order them to pay that third at once, but liberty to apply as to it will be given.

The Plaintiff's title both to the leaseholds and the freeholds is a legal title, and we are in fact giving him possession and mesne profits. Before the *Judicature Act* no bill in equity could have been maintained for that purpose, not because the Plaintiff

(1) 2nd Ed. p. 478.
(2) 4th Ed. vol. i. p. 868.
(3) 8th Ed. p. 514.
(4) Law Rep. 7 H. L. 388.

had no right, but because a Court of Equity had no jurisdiction to enforce it any more than the Divorce Court had. But, before the cause came on to be heard, the Judicature Acts came into operation, transferring the jurisdiction of all the old Courts to the High Court, and enabling all the branches of the High Court to exercise that jurisdiction, with a provision as to pending suits. The Act in this way, no doubt, in some sense affects the rights of parties, but only by way of obviating the objection that a Plaintiff has gone to the wrong Court, and parties have no such vested right in a defence arising from a defect of jurisdiction in a particular Court as ought to be saved when that defect of jurisdiction is removed during a pending suit. Still the question might have been arguable if there had been in the *Judicature Act* no provision as to pending suits, but there is a provision which is decisive. By sect. 22 pending causes, matters, and proceedings other than appeals are transferred to the High Court, and it is provided that the Court "shall have the same jurisdiction in relation to all such causes, matters, and proceedings as if the same had been commenced in the High Court of Justice, and continued therein down to the point at which the transfer takes place." Now if this suit had been commenced in the High Court it could not have been argued that the Court had no jurisdiction to hear it, and we have clear words placing the pending suit in the same position, and shewing that it was intended to give the benefit of the extended jurisdiction in pending suits.

LINDLEY, L.J.:—

The question of jurisdiction turns on the construction of sect. 22 of the *Judicature Act*, 1873, and it is argued that it is not right to construe it so as to make it affect the rights of parties as they stood when the Act came into operation; but as we construe it it only affects such rights, if rights they can be called, as arose from a defect of jurisdiction, and I see no way of escaping the effect of the plain words of the section.

As regards the question whether *Isaac Blackburn Hurst* created a charge in favour of *Ward* or not by the document he gave him, and whether the event has happened on the happening of which a forfeiture was to take place, it is in a sense true that you cannot

C. A. 1882 HURST v. HURST. Lindley, L.J.

charge anything which vanishes if you charge it; but a proviso prohibiting the charging a life estate means in fact to prohibit anything purporting to charge it. That *Ward* never actually claimed under the alleged security is nothing to the point, and his disclaimer cannot relate back so as to destroy the charge when he had once accepted it.

Then as to the argument that the forfeiture was only to take effect if there were children, I should, even apart from *Doe* v. *Eyre* (1), be of opinion that Mr. Justice *Fry's* decision was correct, and that any other conclusion would be merely speculative.

There being no children there is no express disposition of the rents during the lifetime of the tenant for life. The rents therefore of the freeholds, there being no residuary devise, go to the heir-at-law and pass to his incumbrancers. As to the leaseholds, the undisposed-of rents go under the residuary gift of personal estate. *Isaac Blackburn Hurst* therefore, subject to any liability to costs, takes one-third of them, and his incumbrancer will get the benefit of that.

HOLKER, L.J., concurred.

Solicitors for Plaintiff: *Kingsford, Dorman, & Co.*

Solicitors for Defendants: *Poncione; Hales; Ewbank & Partington.*

(1) 5 C. B. 713.

H. C. J.

In re EVANS (A PERSON OF UNSOUND MIND).

C. A. 1882 May 6.

Lunatic—Allowance to Poor Relations.

The income of a lunatic being much more than was required for his maintenance, a respectable aged clergyman, a first cousin, and one of the next of kin of the lunatic, who had been reduced to indigence by unavoidable misfortune, applied for an allowance out of the surplus income. It was not shewn that the lunatic had even known of the existence of the applicant, and it was not suggested that any evidence could be obtained that the lunatic, when sane, had ever done anything for him or expressed any intention in his favour:—

Held, that the application must be refused.

The practice of granting allowances out of a lunatic's property to relations for whom he is under no legal obligation to provide, is rather to be narrowed than to be extended.

THE lunatic was found such by inquisition in September, 1880. He was about fifty-eight years of age.

By a report made on the 2nd of April, 1881, and confirmed by order of the 25th of June, 1881, it was found that the lunatic had never been married; that *Robert Evans*, his first cousin *ex parte paterna*, was his heir-at-law, and that his eight first cousins therein named were his next of kin. His income, exclusive of an interest which he took under the will of his mother, was found to be about £1000. By the order it was directed that £425 a year should until further order be allowed for the maintenance of the lunatic according to the scheme contained in the report, and, the trustees of the mother's will consenting, it was ordered that £400, part of such allowance, should be paid out of the income of the mother's estate, and the remaining £25 out of the income of the lunatic's own property.

The Reverend *J. N. Franklin*, one of the next of kin, applied to the Master for an allowance out of the income of the lunatic's property. By an affidavit in support of this application the applicant deposed that he was in the eighty-first year of his age, and had eight children, one of whom was dependent upon him. That he had been brought to poverty by the disestablishment of the Irish Church, and had for years been dependent on assistance from friends. It appeared that the applicant was a person of

C. A. 1882

In re EVANS (A PERSON OF UNSOUND MIND).

good character, and that his poverty had not arisen from his own improvidence.

The Master, by a report dated the 26th of April, 1882, certified that he approved of an allowance of £100 a year being made to the applicant.

The committee, who was one of the next of kin, presented a petition to confirm this report.

John Pearson, Q.C., and *Clare*, for the Petitioner, submitted the point to the Court.

Everitt, Q.C., and *Procter*, for *Franklin*:—

The Court will do for a lunatic's relations what it is probable that he himself would have done if of sound mind: *Ex parte Whitbread* (1). Thus in *In re Frost* (2) allowances were made to needy collateral relatives who appeared to be next of kin.

[JESSEL, M.R.:—The lunatic, when sane, never did anything for this gentleman.]

He was not then in want. It is to be presumed that the lunatic, if sane, would not have chosen to let one of his nearest relatives, a respectable clergyman reduced to poverty by unavoidable misfortunes, go to the workhouse. The Court has a discretion as to ordering payments out of a lunatic's income. Thus in *In re Strickland* (3) contributions were given towards the building of a church and schools.

[JESSEL, M.R.:—That is an expenditure in connection with the lunatic's property. The erection of a church increases the value of the house property in the neighbourhood.]

Ex parte Whitbread, and cases of that class, shew that the jurisdiction is not confined to matters of property.

[JESSEL, M.R., referred to *Re Earl of Lanesborough* (4), and *Pope* on Lunacy (5), and *W. Barber*, Q.C., to *In re Croft* (6).]

W. Barber, Q.C., and *Aston-Lewis*, for the other next of kin, appeared to oppose, but were not called upon.

(1) 2 Mer. 99.
(2) Law Rep. 5 Ch. 699.
(3) Law Rep. 6 Ch. 226.
(4) Ll. & G. temp. Plunket, 503.
(5) Page 141.
(6) 32 L. J. (Ch.) 481.

JESSEL, M.R.:—

C. A. 1882

In re EVANS (A PERSON OF UNSOUND MIND).

This is an application for an allowance out of the lunatic's estate by one of his next of kin who is in distressed circumstances. He is an aged clergyman and is a very fit object of charity. But he has, as every one in this country has, a right to necessary food and shelter out of the poor-rates. I feel the sympathy one ought to feel for the applicant, whose distressed condition appears to have been brought about by unavoidable misfortune and not by his own improvidence. There are voluntary associations for the relief of such persons, but we are not entrusted with the sign manual in order to enable us to apply the income of lunatics for the benefit of their poor relations. The applicant is a cousin of the lunatic, but south of the *Tweed* that is not, I believe, considered to constitute a strong claim. A cousin has no legal claim, and I am not aware that he has any moral claim. On what principle, then, should any part of the lunatic's property be given to him. I see none, except under the principle laid down in *Ex parte Whitbread* (1). Lord *Eldon* there says: "The Court in making the allowance has nothing to consider but the situation of the lunatic himself, always looking to the probability of his recovery, and never regarding the interest of the next of kin. With this view only, in cases where the estate is considerable and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court, looking at what it is likely the lunatic himself would do if he were in a capacity to act, will make some provision out of the estate for those persons. So where a large property devolves upon an elder son who is a lunatic as heir-at-law, and his brothers and sisters are slenderly or not at all provided for, the Court will make an allowance to the latter for the sake of the former upon the principle that it would naturally be more agreeable to the lunatic and more for his advantage that they should receive an education and maintenance suitable to his condition than that they should be sent into the world to disgrace him as beggars." That does not apply to first cousins. Then again his Lordship says: "The difficulty I have had was as to the extent of relationship to which an allowance ought to be granted. I have found instances in which the Court has in its allowances to

(1) 2 Mer. 99, 102.

C. A. 1882

In re EVANS (A PERSON OF UNSOUND MIND).

Jessel, M.R.

the relations of the lunatic gone to a further distance than grandchildren—to brothers and other collateral kindred; and if we get to the principle we find that it is not because the parties are next of kin of the lunatic, or as such have any right to an allowance, but because the Court will not refuse to do for the benefit of the lunatic that which it is probable the lunatic himself would have done." The guiding principle then is the benefit of the lunatic, and the allowance is made because it would be a disgrace to him that certain near relatives should not be maintained and educated. But it has never been said that it would be a disgrace to a lunatic that his cousins should not be maintained and educated, nor that it is to be presumed that it is a matter of interest to him what becomes of his first cousins. In *In re Blair* (1) Lord *Cottenham* said, "That he entertained great doubts with respect to the power of the Great Seal to grant, and with respect to the propriety of granting allowances to relations of lunatics, for whom the lunatic was not legally bound to provide." His Lordship then, after referring to *Ex parte Whitbread* (2), and stating that Lord *Eldon* had felt great difficulty in acceding to an application similar to that before him, but had at last acceded to the prayer, and that the precedent so made had been followed in several subsequent instances, went on to say that, "the practice, however, was one which could not be regarded with too much caution, and the principle involved in it ought to be narrowed rather than extended in its operation; and his Lordship desired that it might be understood that he would never exercise such a jurisdiction without the greatest possible jealousy and caution. As, however, the principle had been so far followed, and as there seemed no probability that the lunatic would recover, or would be capable of greater enjoyments than those which were now afforded to her, his Lordship would, in the present instance, make the order." Two other cases were referred to before us. One was *In re Croft* (3), as to which I shall say no more than that the Lord Justice *Turner* expressly stated that it was not to be taken as a precedent, *i.e.*, that it was not to be cited before other Judges as a case which was to guide them. The other was *In re Frost* (4), where an allowance was

(1) 1 My. & Cr. 300, 302.
(2) 2 Mer. 99, 102.
(3) 32 L. J. (Ch.) 481.
(4) Law Rep. 5 Ch. 699.

made out of a lunatic's estate to poor relatives on the ground that she had expressed an intention to make a provision for them. A similar principle would apply if the lunatic had been in the habit of making an allowance while sane, in which case a moral obligation would arise, for the recipient no doubt would regulate his mode of life on the faith of its being continued. Relationship was not the only ground for making the allowance in *In re Frost* (1), here there is no other. In the present case it does not even appear that the lunatic knew of Mr. *Franklin's* existence, but it would not alter my judgment if it were shewn that he did. We therefore cannot allow the case to stand over to inquire into that, it not being suggested that any circumstances exist from which it can be inferred that the lunatic ever had, any intention of doing anything for Mr. *Franklin*. I concur with Lord *Cottenham* in thinking that the practice of giving away a lunatic's property ought to be narrowed rather than extended. It is not the province of this Court to give general charity at the expense of a lunatic's estate

LINDLEY, L.J.:—

I am of the same opinion and for the same reasons. The Court ought not to give away a lunatic's property for the benefit of other people, it ought to act only with a view to the benefit of the lunatic. I agree with the observations of Lord *Cottenham* in *In re Blair* (2). As to *In re Croft* (3), if we are to attend to it at all, we must observe that all parties wished the allowance to be made, and the Court yielded, saying that the case was not to be treated as a precedent. Here the question is whether we ought to make an allowance simply on the ground that the applicant is one of the next of kin and a deserving object of charity, and I am of opinion that we ought not.

Solicitors for all parties: *Bower, Cotton, & Bower.*

(1) Law Rep. 5 Ch. 699. (2) 1 My. & Cr. 300, 302.
(3) 32 L. J. (Ch.) 481.

H. C. J.

C. A.
1882
V.-C. B.
Feb. 16.
C. A.
May 8.

NEW LONDON AND BRAZILIAN BANK *v.* BROCKLEBANK.

[1881 N. 294.]

Company—Trustee of Shares—Lien on Shares for Debt of Trustee—Equitable Title to Shares—Priority.

The trustees of a marriage settlement which authorized them to invest in the shares of any trading company, invested part of their trust funds in the purchase of shares in a limited banking company, which were transferred into their joint names. By the articles it was provided that the company should have a first and paramount charge on the shares of any shareholder for all moneys owing to the company from him alone or jointly with any other person, and that when a share was held by more persons than one the company should have a like lien and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof alone or jointly with any other person. One of the trustees was a partner in a firm which afterwards went into liquidation, at which time it owed the company a debt which had arisen long after the registration of the shares in the names of the trustees:—

Held, by *Bacon*, V.C., and by the Court of Appeal, that the bank had a lien on the shares for this debt which must prevail over the title of the *cestuis que trust*.

Whether as between themselves and the *cestuis que trust* the trustees were authorized to make such an investment, *quære*.

THE Plaintiff company was a limited company, and the 105th and 106th articles of association were as follows:—

105. "The company shall not be bound by or recognise any agreement to transfer or charge any share, or any equitable, contingent, future or partial interest, or other right in, to, or in respect of such share, except an absolute right thereto in the person from time to time registered as the holder thereof."

106. "The company shall have a first and paramount lien and charge available at law and in equity upon all the shares of any shareholder for all moneys owing to the company from him alone or jointly with any other person, and when a share is held by more persons than one the company shall have a like lien and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof alone or jointly with any other

person, and in any case whether such moneys shall be payable or not."

The Defendants *Brocklebank* and *Mee* were registered as joint holders of 123 shares of £20 each in the company, and *Mee* was registered as sole holder of 10 shares. These shares were all acquired long prior to 1879.

Down to June, 1879, *Mee* was a partner in the firm of *Francis Saunders & Co.* In that month the firm presented a petition for liquidation by arrangement, and a resolution for liquidation was passed. At the commencement of the liquidation the Plaintiffs were the holders of two acceptances of the firm for £2000 each, which had been dishonoured, and they commenced this action to enforce their lien for these sums on the 123 shares and the 10 shares.

Brocklebank and *Mee*, by their statement of defence, stated that they were the trustees of the marriage settlement of Mr. and Mrs. *Brogden*, which authorized the trustees to invest the trust funds on any of the securities therein mentioned, including the stocks, funds, shares, loan notes, debentures, mortgages, or securities of any corporation, company, or public body, municipal, commercial, or otherwise, in the *United Kingdom*. That the shares in question had been purchased with part of the trust funds, and were held upon the trusts of the settlement, and that neither of the Defendants had any beneficial interest in any of the shares, but that they held them on the trusts of the settlement. They set up a counter-claim for payment of dividends on the shares.

The trustee in liquidation was made a party, but disclaimed all interest.

The action came on to be heard before Vice-Chancellor *Bacon*, on the 16th of February, 1882.

J. Beaumont (*Marten*, Q.C., with him), for the Plaintiffs, contended that they were entitled under art. 106 to a first and paramount lien on the shares held by and registered in the names of the Defendants.

H. Burton Buckley, for the Defendants:—

The right claimed by the Plaintiffs under art. 106 is a purely

C. A. 1882

NEW LONDON AND BRAZILIAN BANK v. BROCKLEBANK.

equitable right, which did not arise until the liquidation in 1879, and there being a conflict between two equitable titles that of the Plaintiffs must be postponed to the prior equitable title which the *cestuis que trust* acquired in 1876 when these shares were purchased pursuant to the trusts of the settlement; and of that prior equitable title they cannot be deprived by any indebtedness to the bank on the part of their trustee: *Shropshire Union Railways and Canal Company* v. *The Queen* (1); *Bradley* v. *Riches* (2); *Cory* v. *Eyre* (3). Plaintiffs therefore are not entitled to forfeit or sell the shares for payment of the debt due from the firm in which *Mee*, one of the trustees, was a partner.

BACON, V.-C., had very great doubt whether the argument for the Defendants had any application to this case. The trustees acquired, and were registered as the holders of, these shares subject to the provisions of the articles of association, and with the obligation that the shares should be liable to discharge any debt which might be owing to the company from the buyer of the shares, and that obligation was never severed from the shares. It must be declared that the Plaintiffs were entitled to a lien with judgment for a sale. Defendants to pay the costs of the action, and their counter-claim dismissed with costs.

C. A.

Brocklebank and *Mee* appealed. The appeal was heard on the 8th of May, 1882.

H. Burton Buckley, for the Appellants:—

The Court has to decide between two equitable titles. The company have only an equitable lien, which they cannot enforce without the aid of the Court. The articles no doubt give the company a lien on shares for what is due from the shareholders to the company. But the *cestuis que trust* under the settlement had an equitable title arising in 1876, at which time nothing was due to the company.

[JESSEL, M.R.:—A company does not recognise trusts.]

It has been held that a *cestui que trust* of shares has a *locus*

(1) Law Rep. 7 H. L. 496. (2) 9 Ch. D. 189.
(3) 1 D. J. & S. 149.

standi against the company and can sue it: *Binney* v. *Ince Hall Coal and Cannel Company* (1), and in *Shropshire Union Railways and Canal Company* v. *The Queen* (2), the right to enforce an equitable title to shares against the company is recognised. The company only acquired their equity in 1879 when the debt arose, and they were met by a prior equity on behalf of the *cestuis que trust* under the settlement.

[JESSEL, M.R.:—The shares were bought subject to the contract that the company should have a lien for the debts of the shareholders.]

A. B. is a trustee for me of shares in a company and agrees to charge them, there can be no charge till there is a debt.

[JESSEL, M.R.:—A trustee with the consent of the *cestui que trust* takes a lease of a house on the terms that the rent is to be secured by an equitable mortgage of the furniture, can the *cestui que trust* say that his title to the furniture defeats the landlord's charge?]

That is a charge of something to which the *cestui que trust* is liable.

Marten, Q.C., and *J. Beaumont*, for the company, were not called upon.

JESSEL, M.R.:—

This to my mind is a perfectly plain case. By its articles of association the banking company had a lien or charge on shares standing either in a single name or in joint names for any debt due from any of the holders, either separately or jointly with any other person. The shares now in question were standing partly in the name of Mr. *Mee* alone, partly in the name of *Mee* and another, and *Mee* was indebted to the bank in a joint debt, that is a debt owed by him together with another person. The case is clearly within the terms of the articles of association. *Mee* acquired the shares under that contract, he is bound by it, and

(1) 35 L. J. (Ch.) 363. (2) Law Rep. 7 H. L. 496.

C. A. 1882 NEW LONDON AND BRAZILIAN BANK v. BROCKLEBANK. Jessel, M.R.

against him the charge is perfect. But it is said on behalf of the Appellants that *Mee* was a trustee for others, that he bought these shares with other people's money, being duly authorized so to purchase them, and held them on their behalf, and that the debt to the company, having arisen since the purchase, must be postponed in equity to the equitable rights of the *cestuis que trust*, on the ground that the equitable charge, which is first in time, is first in right. The answer to that is, that the charge of the bank is first in right, and indeed first in time. The charge of the bank took effect as one of the terms on which the registration was made, it was this, "We will admit you, *Mee*, as a shareholder in this bank on the terms that whenever you owe us any money we shall have an equitable charge on these shares." That contract was perfect at the moment when the shares were registered, there is no possibility therefore of the title of the *cestuis que trust* being prior. That alone would be conclusive, but there is another ground equally conclusive, which is this—the *cestui que trust* buys in the name of the trustee property subject to a charge in a given event, can that *cestui que trust* get the benefit of the purchase, and not comply with its terms? I put in the course of the argument an illustration which appears to me to apply to this case, suppose the *cestui que trust* authorized trustees to take the lease of a farm on the terms that the landlord should have an equitable charge on the stock and crops of the farm for the time being for his rent, could the *cestui que trust* say that he would keep the farm, and take the stock and crops, and not pay the landlord, that he could take the benefit of the trustees' purchase free from the obligation on which the purchase was made? It is plain that he could not, it would be the grossest injustice to enable the tenant to exclude the landlord, to whom he gave no notice of the trust, by buying, not with his own money, but with the trust money with the assent of the *cestui que trust*. A decision in favour of the company does not at all contravene the doctrines of equity as to priority of equitable rights. This appeal, therefore, fails, and must be dismissed. It must not be assumed from anything I have said that because the trustees were authorized to invest in the shares of any company they were justified in investing in the

shares of a company whose articles contained provisions such as that now under consideration.

LINDLEY, L.J.:—

I am of the same opinion, and I think the case tolerably clear. The Defendants, *Brocklebank* and *Mee*, are trustees of a settlement, which settlement authorized them to invest the settled funds in the shares of any company. Notwithstanding that very wide clause some discretion must be exercised by the trustees. Thus, for instance, it is clear that such a clause would not authorize them as between them and their *cestui que trust* to invest the trust funds in a company which was known to them to be insolvent. So also it does not follow that because the terms of the investing clause are general the trustees can invest in any company without any consideration, and without regard to its constitution or its rights as against shareholders. That, however, is a question with which the company has nothing to do. The company in which these shares were bought has articles of association, the 106th of which is as follows:—[His Lordship read the 106th clause.] That is a stipulation which is not uncommon in articles of association of banking and other trading companies, and it is a stipulation which every company has a right to make. The trustees then invest the trust moneys in the purchase of these shares upon the terms of that article, and I fail to see upon what ground the equitable owner can claim the benefit of that investment, and say that the shares have been properly bought under the provisions of the trusts of the settlement, and repudiate the terms upon which the trustees have acquired the shares. The case of *Binney* v. *Ince Hall Coal and Cannel Company* (1) does not, I think, present any difficulty. The company there was formed and registered under the old *Joint Stock Companies Act*, and a bill was filed to restrain the company from paying dividends in a certain way. The shareholder there was *Lancaster*, who was a party to the bill, and, as I understand it, it was a mere question of joinder of parties. *Lancaster* could have filed a bill to obtain the relief which the *cestuis que trust* sought to obtain, and the suit would have been quite proper if brought by the *cestuis que trust*

(1) 35 L. J. (Ch.) 363.

C. A. 1882 NEW LONDON AND BRAZILIAN BANK v. BROCKLEBANK. Lindley, L.J.

and trustee. The *cestuis que trust* there were not repudiating the liabilities of their trustees or the rights of the company against their trustee, but were seeking to enforce the rights of their trustee, which is a totally different thing. It was a mere question of form; *Lancaster* might have maintained that bill, and the question merely was whether the *cestuis que trust* could maintain it making him a defendant. Here, in substance, the *cestuis que trust* (though in form they are not parties) are coming forward to say to the company, "You shall not enforce against our trustee those rights which you stipulated for." It appears to me that the decision was right, and consequently this appeal must be dismissed with costs.

HOLKER, L.J.:—

I am of the same opinion. The trustees entered into a contract for the purchase of shares upon certain terms and conditions, among which was a stipulation that the bank should have a lien as provided by the clause which has been referred to. It seems to me that the shares having been purchased on those terms and conditions, it is impossible for the *cestuis que trust* to say that those terms and conditions are not to be observed.

Solicitors for Plaintiffs: *Bircham, Drake, & Co.*
Solicitors for Defendants: *Ingle, Cooper, & Holmes.*

H. C. J.

YORKSHIRE RAILWAY WAGON COMPANY *v.* MACLURE.

C. A. 1882 May 8, 9.

[1879 Y. 26.]

Railway Company—Borrowing Powers—Sale and Hiring of Rolling-stock—Ultrà vires act—30 & 31 *Vict. c.* 127, *s.* 4 [*Revised Ed. Statutes, vol. xv. p.* 598]—*Rights of Debenture Holders.*

A *Railway Company* being in want of money, and being advised that they had no power to borrow, sold part of their rolling-stock to a *Wagon Company* for £30,000, at the same time making a contract with the *Wagon Company* for the hire of the same rolling-stock at a rent which would repay the £30,000 with interest in five years, and then for its re-purchase at a nominal price. At the same time three of the directors guaranteed to the *Wagon Company* the payment of the rent.

The *Wagon Company* brought an action against the *Railway Company* and the sureties for non-payment of rent due.

Kay, J., having held that the transaction was void as against the *Railway Company*, but could be enforced against the sureties:—

Held, by the Court of Appeal, that the transaction was not a borrowing of money, but a *bonâ fide* sale and hiring of the rolling-stock, and was valid both against the *Railway Company* and the sureties.

Observations on the rights of debenture holders over the rolling stock of a railway company.

THIS was an appeal from a decision of Mr. Justice *Kay* (1).

The facts, which are more fully stated in the previous report, and in the judgment of the Master of the Rolls, were shortly as follows:

The *Cornwall Minerals Railway Company* being in want of money applied to the *Yorkshire Railway Wagon Company* for an advance on the security of their locomotives and wagons.

The borrowing powers of the *Railway Company* being nearly exhausted they were advised that they could not give a valid security for the proposed advance as a loan, and it was therefore agreed that the *Railway Company* should sell 15 of their locomotive engines and 200 of their wagons to the *Wagon Company* for £30,000, and should then hire the same locomotives and wagons from the *Wagon Company*. The rolling-stock was accordingly

(1) 19 Ch. D. 478.

C. A. 1882

YORKSHIRE RAILWAY WAGON COMPANY v. MACLURE.

delivered to the *Wagon Company* and the £30,000 received by the *Railway Company* and applied by them in payment of debts owing by them.

By an agreement dated the 20th of June, 1876, under the seal of the two companies, it was agreed that the *Wagon Company* should let to the *Railway Company*, for the term of five years, fifteen locomotive engines at the yearly rent of £4428; the *Railway Company* was to keep them in repair, and if default was made in any of the payments the *Wagon Company* might seize and take away the engines; on the due completion of the agreement the *Railway Company* were to have the option of purchasing the engines at the price of £1 each.

On the same day three of the directors of the *Railway Company*, *J. W. Maclure*, *J. Nield*, and *A. C. Sherriff*, signed a guarantee for the payment of the rent and performance by the *Railway Company* of all the stipulations contained in the agreement.

A similar agreement and guarantee were made as to the 200 railway wagons, the rent for the term being £2952.

The rent for the engines and wagons being in arrear, the *Wagon Company* brought the present action against the guarantors on their guarantees, and by amendment against the *Railway Company* on their agreement, for damages for non-payment of the rent.

Mr. Justice *Kay* held that the sale and hiring was in fact a borrowing of £30,000 on the security of the rolling-stock, and was *ultrà vires* and void under the 7 & 8 Vict. c. 85, s. 19, and dismissed the action as against the *Railway Company*. But his Lordship held that nevertheless the guarantee was valid, and gave judgment against the guarantors for the amount claimed.

The Plaintiff company appealed from this judgment so far as it dismissed the action against the *Railway Company*, and the Defendants, the guarantors, appealed against the other part of the judgment.

Romer, Q.C., and *Bunting*, for the Appellants in the first appeal:—

The transaction was entirely within the powers of the company. It was not a borrowing under the form of a fictitious sale, but a *bonâ fide* sale of the rolling-stock and re-hiring of the same stock.

Railway companies have a perfect right to sell any part of their rolling-stock; and if they find it more profitable to hire stock than to obtain it in any other way, they are justified in doing so: *Blackmore* v. *Yates* (1). It may be that the first idea was to borrow the money, but the *Railway Company* gave that up when it was found to be *ultrà vires*, and when the agreement was executed there was no intention in the minds of any of the parties except a hiring. Even if the transaction was a borrowing of money our action may be supported, for the money was wanted to pay good debts, and we are entitled to stand in the place of the creditors who were paid by means of it: *In re German Mining Company* (2); *Hoare's Case* (3); *In re Cork and Youghal Railway Company* (4); *Ex parte Williamson* (5); *Marlow* v. *Pitfeild* (6).

Fischer, Q.C., and *Cope*, for the *Railway Company*:—

It was an illegal transaction in the teeth of the Act of Parliament. The company had limited powers of borrowing which they could only exercise in a limited manner and which they had exhausted. On the evidence and correspondence it is clear that this was a mere mortgage and *ultrà vires* the powers conferred by the Act of Parliament. Further, even if it were a sale, a company cannot sell its rolling-stock which is necessary for the efficient carrying on of the undertaking. Such a transaction is a violation of the rights of debenture-holders, and is an evasion of the 30 & 31 Vict. c. 127, s. 4, which protects rolling-stock from being seized by a creditor.

Higgins, Q.C., *Davey*, Q.C., *Prior*, and *Deane*, for the guarantors, who were Appellants in the second appeal.

JESSEL, M.R.:—

I must say, speaking for myself, and with the greatest possible respect to the learned Judge of the Court below, that I never saw a stronger or clearer case so far as the *Railway Company* is concerned, that they intended the transaction to be exactly what it is

(1) Law Rep. 2 Ex. 225.
(2) 4 D. M. & G. 19.
(3) 30 Beav. 225.
(4) Law Rep. 4 Ch. 748.
(5) Law Rep. 5 Ch. 309.
(6) 1 P. Wms. 558.

C. A. 1882 — YORKSHIRE RAILWAY WAGON COMPANY v. MACLURE. — Jessel, M.R.

in the deed. Whether the *Wagon Company* were throughout of the same mind, I am not so sure, I think they were in the end, but for a length of time they were not. What occurred may be described in a very few words. The *Railway Company* was in a great pecuniary difficulty and wanted £30,000. The *Wagon Company* had no power to lend money, was not formed for the purpose of lending money, but it was, if I may so say, formed for the purpose of lending wagons or railway rolling-stock. Notwithstanding this, the *Railway Company* applied to the *Wagon Company* to lend the *Railway Company* £30,000 on the security of this rolling-stock. That was the original application beyond a doubt, and that was acceded to on the part of the *Wagon Company*. It was brought before the board of the *Wagon Company*, and I think it is clear that the meaning of the expressions used by the *Wagon Company* was an accession to those terms:—an advance by way of loan with the personal guarantee of the directors of the *Railway Company*. Matters went on for some time on that footing, and then it was suggested to the *Railway Company* that perhaps their proceedings were not according to law, as they had no power to borrow this sum of money. Thereupon, like sensible men, they consulted their solicitors, and their solicitors, like sensible men, took the opinion of eminent counsel. What he told them I do not know, but I infer from some expressions in the case that was afterwards laid before him, that he told them the loan was illegal, and that the only way of carrying out the real object of the *Railway Company*, the obtaining of the £30,000, would be to sell the rolling-stock and then to take a lease of it from the purchasers, and in that way to retain the use of it on payment of what was equivalent to the loan and interest in five years by way of rent. Thereupon the *Railway Company*, no doubt according to suggestions made at the conference, stated a case for that counsel's opinion, and they stated the case in the plainest possible way, that what they wished to do was to get £30,000 by the sale of their rolling-stock and taking a lease of it from the *Wagon Company*, and he says that, in his opinion, that can be done. Thereupon that opinion was communicated to the *Railway Company*, and what they did was this. They altered their resolution —in fact they seem to have altered it by putting a pen through

it—they altered their resolution for a loan to a resolution for a sale, and directed the arrangement to be carried out according to the terms of the opinion of counsel. Thereupon the draft was sent to the solicitors of the *Wagon Company*, and it was a draft which affirmed the sale.

It is plain from the first letter, sent immediately after they received the opinion, that the advisers of the railway company perfectly well knew what they were doing, for Mr. *Read*, who is the agent of the railway company, writes on the next day, the 27th of April (this is the first time it comes in): "The draft contract for the sale and re-purchase of the stock please send to the company's solicitor, Mr. *J. A. M. Cope*, 4, *Victoria Street, Westminster, London.*" He tells them it must be a draft contract for sale and re-purchase, as was advised by counsel, although the original notion had been a loan. The *Wagon Company's* secretary even up to the 18th of May continued to talk of a loan and advance, but when we come further we find that there is a change. A correspondence goes on, which begins with the letter of the 1st of June, in which the secretary of the *Wagon Company* wants owner plates affixed. That letter is answered on the 2nd of June, saying it shall be done. That is again answered on the 6th of June; and then on the 9th of June they are told that a part are already fixed, and that the rest shall be affixed. That shews that they had changed their intention. Then we find this: there is no formal resolution of the *Wagon Company* rescinding their previous resolution, but there is a resolution to this effect—that the draft contracts are with their solicitors, and then finally when they are ready the contracts are brought to the board of directors of the *Wagon Company*, read over, and the seal ordered to be affixed, and a similar process takes place as regards the *Railway Company*. There had been, before these drafts were finally agreed upon, the usual discussion between the solicitors on both sides and the usual contest, the one side endeavouring to get better terms and the other side resisting, and the usual compromise as to the terms. No one who knows about such matters and reads the correspondence can doubt for a moment that the solicitors on both sides believed that that was a real transaction now, whatever it was before. In other words, as far as the *Railway*

C. A. 1882

YORKSHIRE RAILWAY WAGON COMPANY v. MACLURE.

Jessel, M.R.

Company is concerned it is clear to demonstration that they did not intend to do anything which was illegal; they were advised that the original notion was illegal, and they determined to carry out their object in a legal way. To say that these gentlemen authorized the seal of their company to be affixed to a fraud and a sham is contrary to the evidence. The secretary of the *Wagon Company* was under the impression that it was still a loan notwithstanding Mr. *Read's* letters, but the solicitors could not have been under that impression; the thing is too plain on the face of it. They knew perfectly well what it was, and the company put it in the hands of their solicitors and sanctioned the seal being put on those terms. But even if the *Wagon Company* understood it as a loan, in order to set aside the deed, that is to treat it as a nullity, you must shew that the *Railway Company* were parties to the understanding. You cannot have a bargain on one side, and if the *Railway Company* only sealed this document because it carried out their intention, you cannot say it is not the real contract between the parties. It appears to me that it was the real contract between the parties, and that the original intention had been modified, that is to say, they intended throughout to carry out one object, namely, obtaining £30,000 by repaying it in five years. That was their object, and that they carried out. On the other hand, the object of the *Wagon Company* was undoubtedly to get back that £30,000 with interest by instalments over a period of five years. The mode of carrying it out was indifferent to them so long as they were safe; therefore they acceded to the terms suggested to them originally by the *Railway Company* to make it a sale and lease. Therefore that being so, it appears to me that the judgment as far as it dismisses the action of the *Wagon Company* cannot stand.

I should like before parting with the case to make an observation or two with reference to the argument addressed to us on two matters; first, the position of the debenture holders, and, secondly, the effect of our judgment with reference to the Act of Parliament. I do not assent entirely to either of the propositions brought forward in argument, but I do to some extent. First of all, I am not going to say that debenture holders have not some sort of security over the rolling-stock, though what its precise nature may

be is another matter. It may be that they have this kind of security, that is a security on the rolling-stock for the time being—because it is always changing, it is not like a mortgage—subject to the right of the railway company not only to use it in the ordinary course of business, but to replace it in the ordinary course of business; that is to say, they may sell or part with or use those wagons, engines, locomotives, and so on, and replace them by others either of a better description or otherwise, so that they may part with them for any reasonable purpose in the ordinary course of business. If there is a new invention, and they find they can buy some better locomotives, they may part with the old stock, or if they become useless and they can hire a better class of locomotives, I should say that they might part with them in the ordinary course of business. But as at present advised, I do not think they could sell the whole of the rolling-stock to pay the debts which were subsequent in priority to the debentures. I think that is the answer to any notion of this contract affecting the rights of the debenture holders. If it were not a contract in the ordinary course of business, if it were a mere mode of raising money for the purpose of paying debts which ranked below the debenture holders, the only result would be that people who bought the rolling-stock would buy subject to the incumbrance of the debenture holders. The result would be that the *Wagon Company* would buy with a bad title. Therefore no decision of ours in this case as to the right to the rent would affect their right to the locomotives and wagons which are not claimed in this action. Besides this, the debenture holders are not parties to the action, and in no way, therefore, can our decision affirm the title of the *Wagon Company* to the things purchased. It does not make it less a purchase. You may buy an equity of redemption if you are foolish enough to do so, and the only question is whether the transaction was a sale or not. On that point, as I said before, it is not necessary to say more.

As regards the Act of Parliament, the Act of Parliament I agree prohibits borrowing except in a particular way, but it does not prohibit selling. Suppose there were no debenture holders, why should not you allow the *Railway Company* to sell its rolling-stock to pay its debts? It may be that the company is in such a posi-

C. A. 1882

YORKSHIRE RAILWAY WAGON COMPANY v. MACLURE.

Jessel, M.R.

tion that unless it pays certain of its debts it cannot go on at all. In this very case a portion of the debts were for rent and for rolling-stock, and it might be very desirable for a railway company which had no debenture holders to sell a portion of its rolling-stock in order to prevent the loss of another portion, that is, it having hired a portion, perhaps the larger portion, and being in debt for rent, the lessors of that stock would take it away altogether unless the company sold another portion which belonged to them. Suppose nine-tenths of the stock was hired and one-tenth belonged to themselves, and they sell the one-tenth out and out and still carry on business with the other nine-tenths, if they did not do that they would have no money to pay the *Wagon Company* for the nine-tenths, and they would only have one-tenth with which to carry on the business. Would it be against the terms of the Act of Parliament for them to sell the rolling-stock of the company? It does not appear to me to be so. Would it be reasonable to say that they could not sell the rolling-stock? It does not appear to me that there is any analogy to the case of land. One never heard of a man who sold his furniture to pay his debts represented as borrowing money to pay them. It is paying the debts not by borrowing money but disposing by way of sale of his chattels.

It seems to me our decision in this case will by no means encourage people to evade the Act of Parliament, or enable them to evade it, that is, to do anything which is either expressly or impliedly prohibited by the Act of Parliament; therefore I am not afraid of saying in this case that in my opinion that which I characterised during the argument, and I am afraid I must still characterise, as an unconscionable defence, ought not to prevail, and that our not allowing it to prevail will by no means interfere with the benefits conferred on the railway and the public by this Act of Parliament.

LINDLEY, L.J.:—

As I understand the judgment of Mr. Justice *Kay*, he decided against the Appellants on the ground that the transaction which is comprised in these four deeds which we have been considering did not represent the real transaction between the parties. He

says (1), "I have gone through that correspondence minutely for the purpose of answering the question which I propose to ask myself—whether this was really a transaction of purchase and hire, and if not, what was the meaning of the transaction? And I come to the conclusion that from the first and throughout it was on both sides treated as an advance of £30,000 on the security of the rolling-stock." Then he says lower down, "In my opinion it was a loan and borrowing of £30,000, and that the mode in which it was carried out was merely an attempt to give a security for that loan upon the rolling-stock, and that this was perfectly well known to both the contracting parties." I understand the view the learned Judge took was this, that this transaction of hire was a mere device or cloak to conceal a loan. If that had been the view I took of the facts I should have come of course to the same conclusion. I should disregard or throw aside the cloak, and look at the real transaction alone. But for reasons I will give presently I am satisfied that the purchase and hire transaction was the real transaction, in this sense—that the parties meant it to operate according to its tenor as comprised in the deeds. It was not intended by them as a mere blind or cloak for something behind, it was a transaction substituted for another, but *bonâ fide* substituted, and intended to be acted upon according to its purport and apparent effect.

The short history of the case appears to be this: that the *Railway Company* was sorely in want of money, having exhausted their borrowing powers, or very nearly so, and they wanted £30,000 which they did not know how to get, and they applied to the *Wagon Company* to know whether they could assist them; they applied as business men who were not lawyers naturally would for a loan of money on such security as they could give. There is no doubt the transaction commenced in that form—an application by the *Railway Company* for a loan. Now the persons to whom they applied for the loan were the *Wagon Company*. The *Wagon Company* had no power to lend the money, but they had the power to buy rolling-stock and to let it out on lease, and they entertained the proposal, not in any definite shape, but loosely at first, and ultimately they entertained it in the way in which

(1) 19 Ch. D. 483.

C. A. 1882 — YORKSHIRE RAILWAY WAGON COMPANY v. MACLURE. — Lindley, L.J.

they could give effect to it. I understand that the *Railway Company* found out before the transaction had assumed its ultimate shape that they were in a difficulty—that they could not borrow the money—their borrowing powers were exhausted, and they could not do it. But another method, I will not say of doing the same thing, but of doing something which was as useful as the other, was suggested and they took advice as to its legality. Thereupon, it appears to me, the original idea was *bonâ fide* dropped and another method was had recourse to, not for effecting the loan, but for effecting a different transaction, which would answer the purpose of the *Railway Company* just as well. All they wanted to do was to get the £30,000. That was the real transaction between the parties, and that transaction was one which was embodied in the deeds upon which this action is brought. If we look on that transaction as the real transaction, upon what ground can we treat it as illegal? If it were a mere cloak or screen for another transaction one could see through it, but once come to the conclusion that it was the *bonâ fide* real transaction between the parties, intended by both sides to operate according to its tenor, there is no mode that I know of of holding it illegal unless you find it prohibited by some Act of Parliament or void by reason of some principles of law. It is said to be an evasion of the Act of Parliament really to borrow the money. There is always an ambiguity about the expression "evading an Act of Parliament." In one sense you cannot evade an Act of Parliament; that is to say, the Court is bound so to construe every Act of Parliament as to take care that that which is really prohibited may be held void. On the other hand, you may avoid doing that which is prohibited by the Act of Parliament and you may do something else equally advantageous to you which is not prohibited by the Act of Parliament. It appears to me that the transaction falls under the last of these two classes, it is a transaction as useful for the *Railway Company* as the other, but it is a real transaction, and is not struck at by the Act of Parliament at all.

Under those circumstances, without saying a word as to the rights of any of the debenture holders, looking at the matter as raised by the Plaintiffs on one side and the Defendants on the

other, it appears to me, on the evidence, that we cannot hold that this transaction is a cloak for another. I have come to the conclusion that this is a real transaction and valid accordingly.

HOLKER, L.J.:—

The only question which has been seriously discussed in this case is whether the handing over, so to speak, of the £30,000 by the *Wagon Company* to the *Railway Company* was a loan or was not. If it was a loan it was bad, and the judgment of the Court below ought to be supported: if it was not a loan it was good. The question whether it was a loan or not is a question of fact, and upon the evidence which has been presented to the Court I have come to the conclusion that (whatever might have been the original intention of the two companies) when the instruments which were to carry out the arrangement between them were executed, neither the *Railway Company* nor the *Wagon Company* intended this to be a loan.

Let us see how the matter stands. The *Railway Company* were in want of money; they had borrowing powers, but those borrowing powers had been exhausted, or nearly exhausted: whether they knew that fact or not, does not very clearly appear, but that was so. Then they enter into negotiations with the *Wagon Company*, and it is proposed that the *Wagon Company* should advance them a certain sum of money—£30,000—on security of certain locomotive engines and rolling-stock. They were willing to receive that advance, there is no doubt about that; they said they were willing to get the advance on the security proposed. Then there was a correspondence. It seems that they must, very shortly after the negotiations were set afoot, have either discovered that their borrowing powers were not adequate, or they must have come to the conclusion that it was not absolutely certain that they could borrow this money, because apparently they consulted counsel on the subject. They consulted their solicitor first and then they consulted counsel, and counsel advised them that they could not do it. Their desire was to raise £30,000; it mattered very little to them how they raised that money, but they were advised they could not do it by a loan. Having received that advice, which was perfectly sound advice, what did they do? It is

C. A. 1882 YORKSHIRE RAILWAY WAGON COMPANY v. MACLURE. Holker, L.J.

suggested that they set to work to devise some way of cloaking or disguising this loan, for they were determined to carry it out and determined to borrow the money; that they set their wits to work to devise some way of disguising the whole transaction. I must say, if that is so, the directors of this *Railway Company* acted in a very nefarious way, because, in such a case, they would know perfectly well that the loan, if made, would be bad, and that the *Wagon Company*, who made it, would be unable to get their money back again. They would, in fact, know that the *Wagon Company* would pay £30,000 out of their pockets without having the slightest security for it, and they would have devised that scheme which would have been simply a device to rob their neighbours, the *Wagon Company*. Is it likely that men against whom nobody has said anything, or, as far as we know, thought anything ill, would entertain such a design? Is it not more likely that they would consult with those who were able to advise them, and who would devise, or had devised, some means for them by which they could get the £30,000 honestly, leaving the company who advanced the £30,000, secured? I should think so. They were advised they could do it in this way, by selling their rolling-stock to the *Wagon Company*, and then by taking a lease of it from the *Wagon Company* on certain terms, with the stipulation that they should be at liberty to buy it back at the same price they sold it for, paying certain interest for the money. That they were advised could be done. Whether the advice was right advice or not is very little to the purpose. Whether it could be done without interfering with the rights of the debenture holders is again very little to the purpose. If they were advised that the transaction could so be carried out, they were not endeavouring to disguise a loan and to prevent people finding out that it was really a loan. It was not a loan, it was a transaction of a different nature altogether.

Then, with regard to the *Wagon Company*, we need only ask what are the probabilities with respect to the *Wagon Company*. By the theory which has been set up by Mr. *Fischer*, we are asked to assume that the *Wagon Company*, knowing that they were only conspiring, so to speak, with the *Railway Company* to disguise the transaction and to make it assume the appearance of something

else when it really was a loan, consented to do that, knowing, at the same time that the *Railway Company's* powers of borrowing were exhausted, and that if they merely lent this money on the security which was offered to them, they would not have any security at all. I cannot conceive a sensible body of men being willing to invest £30,000 upon security which was utterly worthless. Besides all this the letters, if very carefully read, and the minutes, point to what has been indicated by my Lord, that originally the transaction undoubtedly was intended to be a loan, the parties found out that could not be accomplished, and they altered their view and resorted to another transaction which was not a loan but which was a lease.

JESSEL, M.R.:—

That disposes of both appeals. The appeal of the sureties must be dismissed with costs. It was because Mr. Justice *Kay* thought the transaction a loan that he let the *Railway Company* off the principal and interest, but if it is not a loan the sureties are guarantors of the rent; therefore in deciding that, we have decided the other point.

Solicitors for Plaintiffs: *Singleton & Tattershall.*

Solicitors for the *Railway Company* and for *Maclure: Cope & Co.*

Solicitors for executors of *Sherriff: Morley & Sherreff.*

M. W.

C. A.
1882
KAY, J.
Jan. 26.
C. A.
April 28;
May 16.

22 Ch D 156

In re OAK PITS COLLIERY COMPANY.

Winding-up—Claim of Landlord for Rent subsequent to Commencement of Winding-up.

E. demised a colliery to a limited company for twenty-five years from January, 1858. The company mortgaged it by under-lease. In 1878 an agreement was come to between *E.* and the company for a new lease of the colliery and of the mines under 163 acres of adjoining land, these latter mines to be worked by outstroke. The company then brought plant and machinery on the 163 acres, sunk trial pits, and found coal, but no new lease was granted. On the 28th of January, 1880, the mortgagees took possession of the colliery, but did not interfere with the 163 acres. On the 31st of January, 1880, a petition was presented to wind up the company, on which an order was made. The liquidator did not take possession either of the colliery or of the 163 acres, or the minerals under them, nor did he take any steps to give the demised property up to *E.* The plant and machinery brought on the 163 acres remained there. In May, 1880, the liquidator had the whole plant and machinery, both on the colliery and on the 163 acres, valued, with a view to a sale of these chattels to the mortgagees, that they might sell the property as a going concern, but this purchase by the mortgagees was not carried into effect. In May, 1881, the liquidator advertised the whole plant and machinery for sale. On the 30th of May, 1881, *E.* took out a summons for leave to distrain on the plant and machinery on the 163 acres, or to have the proceeds paid to him. In June, 1881, the plant and machinery were sold. In January, 1882, *Kay*, J. made an order on the summons that the liquidator should pay to *E.* all the rent accrued since the commencement of the winding-up:—

Held, on appeal, that no case has gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accrued since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property of which the company is lessee, and that the facts that the liquidator left the company's plant and machinery where he found them, that he had them valued for sale in May, 1880, and that he took no steps to surrender the company's interest in the colliery and the 163 acres, did not entitle the landlord to distrain or to be paid in full, and that the summons ought to have been dismissed.

THE question in this case was as to the right of a landlord to be paid in full rent accrued due since the winding-up of the company, in respect of premises of which the company was lessee. The following are the material facts of the case as stated by the Lord Justice *Lindley*:—

In 1858 the company became lessees of the *Oak Pits Colliery*

under a lease for twenty-five years from *Eyton*, which the company afterwards mortgaged by a sublease. In 1878 the company negotiated with the lessor, Mr. *Eyton*, for a surrender of this lease and for a new lease of the *Oak Pits Colliery*, and also of the minerals under 163 acres of adjoining property, and in July, 1878, the company agreed with the mortgagees to give them a mortgage of this new lease when obtained. Early in 1879 these negotiations for the new lease were brought to a close, and an agreement was come to for a new lease of the *Oak Pits Colliery* and of the minerals in the adjoining 163 acres, at a dead rent of £400 a year and certain royalties. As soon as this agreement was come to the company brought plant and machinery on to the 163 acres, and sunk three trial pits and found coal. The surface of the 163 acres was not agreed to be leased to the company, the agreement being that they should work the coal under the 163 acres from the *Oak Pits Colliery*, and not by means of an independent shaft sunk in the 163 acres themselves. On the 28th of January, 1880, the mortgagees took possession of the *Oak Pits Colliery*, but did not interfere with the 163 acres, or attempt to take actual possession of the minerals under them. On the 31st of January, 1880, a petition was presented to wind up the company, and an order was made and a liquidator was appointed in the usual way. The liquidator did not take possession either of the *Oak Pits Colliery* or of the 163 acres or of the minerals under them. The *Oak Pits Colliery* was already in the possession of the mortgagees. The workings in the *Oak Pits Colliery*, through which the minerals under the 163 acres were to be got, were full of water. The trial pits could not be used for working purposes, and there was not, in fact, any method by which the liquidator could have got at or worked these minerals. The liquidator, however, did not take any steps to give them up to the landlord, and the plant and machinery used by the company for making the trial pits remained on the 163 acres for about a year and a half, when such plant and machinery were sold as will be stated presently.

In May, 1880, the mortgagees negotiated with the liquidator for the purchase of this plant and machinery and also of the plant and machinery on the *Oak Pits Colliery*, and the liquidator

C. A. 1882 *In re* Oak Pits Colliery Company.

caused a valuation of the whole to be made on the supposition that the whole was to be bought by the mortgagees as belonging to a going concern. This negotiation, however, came to nothing.

In May, 1881, the mortgagees themselves endeavoured to sell the *Oak Pits Colliery*, and the benefit of the agreement for the new lease, and the plant and machinery at the *Oak Pits*. This endeavour was also unsuccessful. In May, 1881, the liquidator advertised for sale all the plant and machinery as well on the *Oak Pits Colliery* as on the adjoining 163 acres. On the 30th of May the landlord, Mr. *Eyton*, took out a summons for leave to distrain on the plant and machinery on the 163 acres, or to have the proceeds of sale thereof paid to him. On the 3rd of June, 1881, the sale took place, and the plant and fixtures in question were sold for £179. On the 26th of January, 1882, the summons came on to be finally disposed of.

Ince, Q.C., and *Caldecott*, for the summons.

Romer, Q.C., and *Bardswell*, for the liquidator, referred to *In re Bridgewater Engineering Company* (1).

Kay, J.:—

I think that the landlord must have his full rent. The winding-up petition was presented in January, 1880. The property was mining property, which had on it plant and machinery of a certain class, and in June, 1881, a year and a half after, this was sold by the liquidator on the premises. It seems the liquidator had remained in possession for the purposes of the colliery company, which was then in liquidation. Now if that was the case the rule of law is settled in this way. In *In re Lundy Granite Company* (2), Lord Justice *James* said: "If the company for its own purposes and with a view to the realization of the property to better advantage remains in possession of the estate which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property;" and his Lordship added, "As a general rule I should have no hesitation in granting

(1) 12 Ch. D. 181. (2) Law Rep. 6 Ch. 462, 466.

leave to a landlord to pursue his rights by distress for rent accrued during the time when the official liquidator chooses to leave the goods on the land." It is suggested that the mortgagees were in possession. But it appears that the mortgagees are only equitable mortgagees. Then I inquire, how comes it that they took possession? I do not understand how that happened. The mortgagees, I understand, make no claim to the plant and chattels.

I am told it was a drowned mine when these equitable mortgagees took possession, which makes their doing so still more inexplicable. If the liquidator was not in possession how comes it that the plant remained on the premises for a year and a half and was then sold? They would be mortgagees by way of underlease. I want to know what advantage it would be to the under-lessee to enter into possession. The possession as between the landlord and tenant would still be the possession of his tenant. I cannot admit that the possession of the under-lessee would alter the position of the company. I must hold that the property was retained by the liquidator for some reason. It appears to me that he had retained possession for the benefit of the company in liquidation, and it follows that the lessor is a creditor of the company in liquidation for the rent accrued due during the liquidation, and it ought to be paid in priority. The landlord will have no costs. The liquidator will take his out of the estate.

T. W. G.

An order accordingly was made for the payment in full by the liquidator of the whole rent of £400 a year accrued after the commencement of the winding-up, amounting to £766 13*s.* 4*d.*

The liquidator appealed. The appeal was heard on the 28th of April, 1882. C. A

Romer, Q.C., and *Bardswell*, for the appeal:—

If this decision is to stand it must be held that in every case where a leasehold belonging to a company is not sold by the liquidator the landlord is entitled to be paid his rent in full. The cases do not support any such proposition; the landlord can only claim his rent in full if there has been a user of the property by

C. A. 1882 — *In re* Oak Pits Colliery Company.

the liquidator for the purposes of the liquidation: *In re Bridgewater Engineering Company* (1). No doubt if the liquidator has had actual possession of the property he must pay the rent. The first case on the subject shewing that the liquidator's doing nothing about the leasehold does not entitle the landlord to full rent is *In re Progress Assurance Company* (2). The company is obliged to hold under the lease unless the landlord re-enters under a clause of re-entry; it cannot help itself.

[BAGGALLAY, L.J.:—How do you distinguish this case from *In re Lundy Granite Company* (3)?]

That case turns on the circumstance that the goods of the company remained on the land in such a way as to shew that possession of the land was retained for the benefit of the company. Here the liquidator never had possession, unless allowing the chattels to remain where they were is a taking possession of the ground on which they were, which we submit it is not.

[BAGGALLAY, L.J.:—Did the liquidator ever offer to surrender?]

He wrote a letter to the landlord offering to do so, but the landlord deposes that it never was received.

[BAGGALLAY, L.J.:—What was the landlord to do? Was he to have neither rent nor possession?]

He might have re-entered.

[*Ince* referred to *In re Brown, Bayley, & Dixon* (4).]

As to the property in the old lease the liquidator has in no way interfered with it and the mortgagees, not he, were in possession. As to the fresh property included in the new take it consisted only of mines, and the leaving chattels on the surface cannot be considered a taking possession of the mines. It would be a cruel hardship if the creditors lost £766 owing to taking possession of chattels worth £179. There was no such occupation as made it reasonable that the whole rent should be paid. So far as any possession was taken it was by the mortgagees. They were the persons intending to sell the leaseholds and they negotiated with

(1) 12 Ch. D. 181.
(2) Law Rep. 9 Eq. 370.
(3) Law Rep. 6 Ch. 462.
(4) 18 Ch. D. 649.

the liquidator for the sale to them of the chattels that they might be able to dispose of the concern as a going concern. Mr. Justice *Kay* was under a mistake in treating the mortgagees as mere equitable mortgagees. They had a legal mortgage except as to the new take, and had a right to take possession. No case goes so far as this as to the rights of the landlord of property which is in lease. Mr. Justice *Kay* lays down the proposition that the possession of the mortgagees is the possession of the liquidators. We ask the Court to reverse that. No case decides that the mere leaving of chattels on land has been held to amount to such a taking possession as to make the liquidator liable for the rent.

Ince, Q.C., and *Caldecott, contrà*:—

If a liquidator buys goods for the purposes of the liquidation they must be paid for; if he hires a house for the purposes of the liquidation the rent must be paid, and so, if he continues in possession for the purposes of the liquidation the rent ought to be paid. Here the company must be taken to have been in possession, and up to July, 1881, there was no offer to give it up. The case is within *In re Lundy Granite Company* (1); *In re North Yorkshire Iron Company* (2); *In re Brown, Bayley, & Dixon* (3).

Bardswell, in reply, was desired by the Court to address himself to the facts of the mortgagees having been in possession, and of the liquidator having had the chattels valued:—

The mortgagees took possession without any concert with the liquidator, and their possession cannot affect him. They offered the property for sale under their mortgage title. In every case where the rent has been paid in full there has been a carrying on of the business or some other circumstance beyond anything that is to be found here: *In re Brown, Bayley, & Dixon*; *In re Silkstone and Dodworth Coal and Iron Company* (4); *In re South Kensington Co-operative Stores* (5).

(1) Law Rep. 6 Ch. 462.
(2) 7 Ch. D. 661.
(3) 18 Ch. D. 649.
(4) 17 Ch. D. 158.
(5) 17 Ch. D. 161.

C. A. 1882

In re Oak Pits Colliery Company.

May 16. The judgment of the Court (*Baggallay*, *Lindley*, and *Holker*, L.JJ.), was now delivered by

Lindley, L.J., who, after stating the facts as above, proceeded as follows:—

The learned Judge was of opinion that the possession of the mortgagees was in effect the possession of the liquidator, and that he had in substance been in possession of the whole property for the purpose of selling it as a going concern. The learned Judge was also under the impression that the mortgagees were merely equitable mortgagees, and had no right to take possession except under some arrangement with their mortgagors. This, however, was a mistake, so far as the *Oak Pits Colliery* was concerned. The mortgagees had a legal and not a merely equitable mortgage of that colliery, and they took possession of it under their legal title.

We are unable to take the same view of the facts as was taken by Mr. Justice *Kay*. It appears to us that the liquidator never had possession of any part of the *Oak Pits Colliery*, or of the minerals under the 163 acres. The possession of the *Oak Pits Colliery* was in the mortgagees. The possession of the surface of the 163 acres was in the landlord, Mr. *Eyton*, and not in the company, although some plant and machinery belonging to the company were on this property or in the trial pits. The possession of the minerals in the 163 acres had never in fact been taken by the company. The company had done no more than ascertain where the minerals were. The company had a right to take possession of them, but had not yet exercised that right. Even if the company can be considered as having ever taken possession of them, the liquidator never in any way interfered with them. His possession, if any, of those minerals was a mere consequence of the equitable ownership in them remaining in the company subject to the equitable mortgage before mentioned.

Another point of some importance appears to have been overlooked in the Court below; the surface of the 163 acres was not to be leased to the company. Consequently the goods and chattels of the company upon such surface could not have been distrained for rent in arrear if a lease had been granted, and if no winding-up order had been made; for a distress for rent can only be made

on the property held by the tenant of his landlord and in respect of which the rent is payable. Quite apart, therefore, from sect. 163 of the *Companies Act*, 1862, Mr. *Eyton* could not have distrained the plant and machinery of the company on the 163 acres, and it was only that plant and machinery which he sought leave to distrain.

It appears to us, therefore, that the order appealed from cannot be supported on the grounds on which the learned Judge in the Court below based his decision. Nor do we think it can be supported on any other grounds.

The object of the winding-up provisions of the *Companies Act*, 1862, is to put all unsecured creditors upon an equality, and to pay them *pari passu*. A landlord who has not put in a distress before the commencement of the winding-up is an unsecured creditor. He can prove against the company under sect. 158 for all rent in arrear at the time of his proof, but his right to distrain is taken away by sect. 163, unless circumstances exist which, in the opinion of the Court, require it to give him leave to distrain under sect. 87. In all cases, however, in which a landlord seeks to distrain after a winding-up order, or seeks to be paid his rent in priority to other creditors, he must shew why he should have such an advantage over the other creditors. There are numerous decisions in the books relating to this subject, and to which it may be useful shortly to advert. They may be grouped into two classes, the first relating to rent in arrear at the commencement of the winding-up, the second relating to rent accruing subsequently to that date.

First, as to rent in arrear at the commencement of the winding-up. 1. If the landlord is a legal creditor of the company in respect of rent in arrear at the commencement of its winding-up, he is not allowed to distrain for the arrears of rent but must prove his debt like any other creditor: *In re Traders North Staffordshire Carrying Company* (1), where the distress was for tolls in arrear; *In re Coal Consumers Association* (2), where the liquidator retained possession, but not for any purpose of liquidation; *Thomas* v. *Patent Lionite Company* (3), a case of voluntary winding-up

(1) Law Rep. 19 Eq. 60. (2) 4 Ch. D. 625.
(3) 17 Ch. D. 250.

C. A. 1882

In re OAK PITS COLLIERY COMPANY.

followed by a compulsory order. 2. Moreover, in cases of this kind the circumstance that the liquidator has retained possession and carried on the company's works, has been held not to entitle a landlord or mortgagee (with a power of distress as and for rent) to distrain for rent in arrear in the winding-up: *In re North Yorkshire Iron Company* (1); *In re Brown, Bayley & Dixon* (2); *In re South Kensington Co-operative Stores* (3). 3. If, however, the landlord is not a legal creditor of the company by reason of the company not being his tenant, he is permitted to distrain even for rent in arrear at the commencement of the winding-up: *In re Exhall Coal Mining Company* (4). 4. And in such a case he will be allowed to distrain although the liquidator offers to allow the arrears to be proved as a debt in the winding-up: *In re Regent United Service Stores* (5).

Secondly as to rent accruing after the commencement of the winding-up. 1. If the liquidator has retained possession for the purposes of the winding-up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding-up: *In re Lundy Granite Company* (6); *In re North Yorkshire Iron Company; In re Silkstone and Dodworth Coal and Iron Company* (7); *In re South Kensington Co-operative Stores*, and see *In re Brown, Bayley & Dixon*, per *Fry*, J. 2. But if he has kept possession by arrangement with the landlord and for his benefit as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain: *In re Progress Assurance Company* (8); *In re Bridgewater Engineering Company* (9).

When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full like

(1) 7 Ch. D. 661.
(2) 18 Ch. D. 649.
(3) 17 Ch. D. 161.
(4) 4 D. J. & S. 377.
(5) 8 Ch. D. 616.
(6) Law Rep. 6 Ch. 462.
(7) 17 Ch. D. 158.
(8) Law Rep. 9 Eq. 370.
(9) 12 Ch. D. 181.

any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full without reference to the amount which could be realised by a distress. This was the view taken by Lord Justice *James* in the case of the *Lundy Granite Company* (1), and by Mr. Justice *Fry* in *In re Brown, Bayley & Dixon* (2), and by Mr. Justice *Kay* in the present case. But no authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee. If the landlord had endeavoured to re-enter and the liquidator had objected, the case might be different, but having regard to the provisions of the *Companies Act*, 1862, we are of opinion that in the case now supposed the landlord must rely on his right, if any, to re-enter and prove for the arrears due to him, and that he is not entitled to anything more.

In the present case the only facts the landlord has to rely upon are, first, the fact that the liquidator left the company's plant and machinery where he found them until he sold them in July, 1881; secondly, the fact that he had them valued in May, 1880, with a view to a sale which was not carried out; thirdly, the fact that he took no steps to surrender the company's interest in the *Oak Pits Colliery* and the 163 acres to the landlord. In our opinion these facts are not sufficient to entitle the landlord either to distrain or to be paid in full. We cannot regard the rent ordered to be paid as a debt, or cost charge or expense, incurred by the liquidator in the course or for the purpose of the winding-up, consequently the order appealed from ought to be discharged and the summons to be dismissed with costs.

Solicitors for liquidator: *F. Venn & Co.*
Solicitors for the landlord: *Simpson, Hammond, & Co.*

(1) Law Rep. 6 Ch. 462. (2) 18 Ch. D. 649.

H. C. J.

C. A.
1882
May 11, 12, 19.

HENTY *v.* WREY.

[1881 H. 529.]

Power—Appointment of Portions before required—Fraud on Power.

22 Ch D 240

B. P. W. having a power of charging portions for younger children on real estate under a settlement which gave him in the clearest terms power to fix the ages and times at which the portions should vest, and contained no provision for raising portions in default of appointment, and having three daughters aged nine, seven, and one, appointed by deed in 1828 £10,000 (being the full amount he was entitled to charge) for the portions of the daughters, to be a vested interest in the three daughters respectively immediately on the execution of the deed, the portions to be paid to them at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them share and share alike, at twenty-one or marriage, if the same age or time should happen after his decease, but if in his lifetime, then the payment to be postponed till after his death, unless he should signify his consent in writing to their being raised and paid in his lifetime; maintenance at £4 per cent. to be raised from his death; and the deed contained a power of revocation. In 1832 he made by deed a similar appointment by way of confirmation of the former, the portions to be vested immediately on the execution of the deed. One daughter married and attained twenty-one, and in 1851 *B. P. W.* appointed £5000, part of the £10,000, to her. The other two died infants and spinsters, one in 1836, the other in 1845. *B. P. W.* assigned to the plaintiff for value in 1875 the £5000 appointed to the two deceased daughters, and after his death the Plaintiff brought this action to have it raised:—

Held (reversing the decision of *Kay*, J., who had dismissed the action as against the owners of the settled estate), that where a donee of a power of charging portions on real estate has, under the terms of the power, clear authority to fix the times at which portions shall vest, and appoints a portion to vest immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one and unmarried, and that the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was not within the power.

Lord Hinchinbroke v. *Seymour* (1) considered and examined.

Held, also, that the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was a fraud on the power as being made with a view to secure a benefit to the appointor; for that having regard to the fact that if the father had died without making any appointment, the children would have been unprovided for, it was manifestly for the benefit of the children that the father should make an appointment, and that as there was nothing to lead to the conclusion that when the

(1) 1 Bro. C. C. 395.

appointments were made the children were likely to die young, and as in the event of the early death of the appointor the children might have derived a benefit from the absolute vesting of their portions, there was no ground for attributing to him an intention to benefit himself by making the portions vest immediately.

Held, therefore, that the Plaintiff was entitled to have the £5000 raised.

THIS was an appeal by the Plaintiff from a decision of Mr. Justice *Kay*. The facts will be found in the report below (1).

Ince, Q.C., and *Townsend*, for the Plaintiff:—

The exercise of the power by Sir *B. P. Wrey* was perfectly valid. It was strictly within the power. There was nothing in the power to control the time of vesting. There is nothing to shew that it was not intended that the portions should be made to vest immediately. The ground of Mr. Justice *Kay's* decision was that it was a fraud upon the remainderman, and therefore on the power. But unless there is an unfair use made of the power there is no fraud on the power. In *Lord Hinchinbroke* v. *Seymour* (2) there was an unfair use made of the power, for the child was in a consumption. That case must be read with reference to Lord *Eldon's* observations upon it in *M'Queen* v. *Farquhar* (3). So in *Wellesley* v. *Earl of Mornington* (4) there was actual fraud. *Davies* v. *Huguenin* (5) turned upon the construction of the deed.

They also cited *Beere* v. *Hoffmister* (6); *Fearon* v. *Desbrisay* (7); *Butcher* v. *Jackson* (8); *Roach* v. *Trood* (9); *Hemming* v. *Griffith* (10); *Keily* v. *Keily* (11); *Duke of Portland* v. *Topham* (12); *Sugden* on Powers (13).

Macnaghten, Q.C., and *Medd*, for Sir *Henry Wrey*, the first tenant in tail:—

Our point is that an appointment cannot be made so as to direct a portion to be raised before it is wanted. This is the principle laid down in *Lord Hinchinbroke* v. *Seymour*.

(1) 19 Ch. D. 492.
(2) 1 Bro. C. C. 395.
(3) 11 Ves. 467.
(4) 2 K. & J. 143.
(5) 1 H. & M. 730.
(6) 23 Beav. 101.
(7) 14 Beav. 635.
(8) 14 Sim. 444.
(9) 3 Ch. D. 429.
(10) 2 Giff. 403.
(11) 4 D. & War. 38.
(12) 11 H. L. C. 32.
(13) 8th Ed. p. 694.

C. A. 1882 HENTY v. WREY.

[JESSEL, M.R.:—How do you state the rule ?]

We can only state it in the terms in which it is laid down by Lord *Thurlow* in that case.

[JESSEL, M.R., had caused the record in that case to be searched for, and it was now brought into Court, and his Lordship, after looking into it, observed that there was there the important circumstance that the child would, in default of appointment, have become entitled to the portion on attaining twenty-one or marrying, and would have been entitled to maintenance in the meantime.]

The bill in *Lord Hinchinbroke* v. *Seymour* (1) cannot have been dismissed on the ground of fraud on the power, for if so it would have been dismissed with costs. *Davies* v. *Huguenin* (2) supports the view that a portion is not to be raised unless it is wanted. In *Remnant* v. *Hood* (3) Lord Justice *Turner* intimates an opinion in the same direction.

[JESSEL, M.R.:—Something in that case may turn on the word "payable," which implies the existence of some one competent to give a receipt. In *Keily* v. *Keily* (4) the decision in *Lord Hinchinbroke* v. *Seymour* is put on the ground of a fraudulent purpose.]

Lord Hinchinbroke v. *Seymour* was followed in *Edgeworth* v. *Edgeworth* (5), and treated as establishing a general rule.

[JESSEL, M.R.:—The learned Judge held that the power required the donee to appoint in a reasonable way, and he thought that to appoint immediately was not appointing in a reasonable way, having regard to the circumstances of the case.]

He relies also on *Lord Hinchinbroke* v. *Seymour* as shewing that the donee must not exercise the power with a view to his own benefit. *Wellesley* v. *Earl of Mornington* (6) affirms the principle. *Beere* v. *Hoffmister* (7) and *Fearon* v. *Desbrisay* (8), do not relate to portions charged on land, and are therefore inapplicable; but in the former the Master of the Rolls suggested that the decision

(1) 1 Bro. C. C. 395.
(2) 1 H. & M. 730.
(3) 2 D. F. & J. 396, 412.
(4) 2 Con. & Law. 334.
(5) Beat. 328, 334.
(6) 2 K. & J. 143.
(7) 23 Beav. 101.
(8) 14 Beav. 635.

might have been different if the father had taken a benefit. The object of the settlor was to enable portions to be raised for the benefit of children who wanted them, and it would have astonished him to learn that the donee could exercise the power with a view to his own benefit.

[JESSEL, M.R., referred to *Hemming* v. *Griffith* (1), and asked whether the donee, if he had three children, could not direct the whole sum to be raised and give it to the only one who attained twenty-one or married.]

We admit that he could, but that would only be appointing for the benefit of the children. *Butcher* v. *Jackson* (2), which is cited against us, decided nothing, but only kept matters *in statu quo*. There are cases where an appointment has been held good as to maintenance, but void as to the *corpus*, if the child did not live to require a portion: *Lady Poulet* v. *Lord Poulet* (3). A power to encumber an estate will be very strictly construed: *Evelyn* v. *Evelyn* (4). *Lord Teynham* v. *Webb* (5) is a strong case in our favour. In *Sugden* on Powers (6) the distinction is strongly drawn between a power to charge portions and a power to appoint an existing fund. A tacit condition is annexed to such powers that the portion is not to be raised till wanted. A similar implication arises as to the qualification of the appointee: *Chadwick* v. *Doleman* (7): *Macoubrey* v. *Jones* (8).

Bush, for the trustee.

[At the conclusion of the Respondent's argument, the Court stated that they would give notice if they desired to hear a reply.]

May 19. JESSEL, M.R.:—

This is an appeal from the decision of Mr. Justice *Kay* as to the validity of a charge on real estate created under a power of charging portions. It is important to consider the case in more than one aspect, because the learned Judge in the Court below

(1) 2 Giff. 403.
(2) 14 Sim. 444.
(3) 1 Vern. 204, 321.
(4) 2 P. Wms. 659, 665.
(5) 2 Ves. Sen. 197.
(6) 8th Ed. p. 695.
(7) 2 Vern. 527.
(8) 2 K. & J. 684.

C. A. 1882 HENTY v. WREY. Jessel, M.R.

decided it on two grounds. He mainly relied on a rule which he supposed to be established, governing the mode in which Courts of Equity are to deal with charges on real estate created under powers of appointment, when those charges are in the nature of portions. This is a question of general law. But he also said that he was prepared to decide the case upon another ground, which is not a question of law but a question of fact, viz. that the appointment was in fraud of the power. The learned counsel who represented the Respondents abandoned this latter ground. I think it right, however, to consider it, both out of respect for the learned Judge, and with a view to shew that the abandonment of this point was justified.

The facts necessary to be stated are not many. [His Lordship here read the power of charging portions contained in the settlement of the 2nd of February, 1825, ending with the words "such sum or sums to be an interest vested in and to be paid to the child and children for whom the same is or are intended to be hereby provided on or at such age, day, or time, or respective ages, days, or times, and to be divided between or among them or any of them (if more than one) in such shares, and to be attended with such provisions for their respective maintenance and advancement as the person making such charge shall think fit."]

Plainer or more emphatic words as regards the right of directing the portions to be vested at any time which the appointor should think fit cannot be imagined, and it was not argued before us that there was any possible question of construction upon the words. It is not merely directed that the money should be vested at such age, day, or time, but that it is to be an interest vested in and to be paid to the child or children at such age, day, or time as the donee of the power should think fit. It comes, therefore, to this, that on the words there can be no question that the parties to this deed intended that the appointor, acting of course *bonâ fide*, should be the judge of the period at which the portions should vest. It was left to him to decide that question, and unless there is some rule of law which says that notwithstanding the plain meaning of the expressions used effect cannot be given to the intention expressed by them, effect must be so given.

Now I come to the appointment. Sir *Bouchier Wrey* had died

and *Bouchier Palk Wrey* had become Sir *B. P. Wrey*. [His Lordship here stated the indenture of the 17th of March, 1828, substantially in the same terms in which it is given on p. 494 of the former report, down to the words "that the same should be raised and paid in his lifetime," at the foot of that page.]

Now I have to remark that when we look at the judgment of Mr. Justice *Kay* on the second point, he appears to have forgotten the effect of the powers reserved by this deed. There was a power reserved to direct the portions "to be paid and payable at such time after his decease as he should appoint," and then there is a power to direct them to be raised in his lifetime, which is very important. Then there was a power reserved to Sir *B. P. Wrey* to revoke the appointment and make fresh appointments. There was therefore an appointment of the £10,000 in favour of the three daughters, with an absolute power to revoke and re-appoint. The three children were young children at the date of the indenture of 1828, the youngest being only one year old. Then by an indenture dated the 10th of July, 1832, indorsed on the indenture of 1828, and by way of confirmation, Sir *B. P. Wrey* charged the same hereditaments with the payment of £10,000 for the portions of his three daughters, *Ellen Caroline*, *Emily Frances*, and *Georgiana Ann*, "to be a vested interest in the said children respectively immediately upon the execution of these presents, and to be paid to them with such provision for their maintenance in the manner in the within-written indenture mentioned." At that time the youngest child was five years old, and the appointment which took effect was that appointment, subject to this, that by a subsequent indenture £5000 was limited to the eldest daughter, so that only £5000 was left for the two younger ones. Now, *Emily Frances Wrey*, one of those two daughters, died in the year 1836, that is four years after 1832 and eight years after 1828. *Georgiana Ann Wrey* died in 1845, at the age of eighteen years or thereabouts. These dates are material as regards the second point. The father survived the two younger children who died minors, and in the year 1875 he assigned their £5000 by way of mortgage or security to the Plaintiff, and the Plaintiff now claims it. The question then is whether that sum is now raisable.

C. A. 1882 HENTY v. WREY. Jessel, M.R.

As I have already said, although the tenant in tail succeeded in the Court below, he succeeded not upon any question of the meaning of the settlement or the meaning of the appointment, both being too clear for argument, but he succeeded upon the ground of an alleged general rule of law which was held to prevent the intention expressed by the instruments from being carried into effect, and the real question to be considered is whether there is any such rule of law. It is startling to an Equity Judge to be told that there is a rule in Equity preventing people from carrying out their clearly expressed lawful intentions, whether those intentions are expressed in a settlement or in a contract. It was fairly admitted on the part of the Respondents that if there was such a rule of law it was contrary to the intention and contrary to what they were pleased to term the modern rules of construction, and that it was laid down at a time when, as it is alleged, Equity Judges cared less for the correct construction of instruments than they do now, and, as is put in one of the cases, considered themselves at liberty to disregard words to a greater extent than they do now. Whichever way you put it, it is a rule opposed to principle, the principle being that men's contracts or settlements are to have effect given to them according to the intention, and opposed also to the modern rules of construction. But still if it is an established rule we must follow it, as the learned Judge in the Court below thought he was bound to do.

Now, what is the alleged rule? Mr. Justice *Kay* states it in this way (1): "The principle seems to be that a power of this kind being in the nature of a discretionary trust, the appointor must be taken to know that it is contrary to the nature of the trust to make an appointment so as to vest immediately portions in children of tender years, and such an appointment would therefore be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them." I suppose that means not that the appointor must be taken to know, but that such an appointment is not within the power, for if it is within the power he has a right to make it whatever he is taken to know. If it is not within the power it must be because there is a rule of law that by no set of words can

(1) 19 Ch. D. 505.

you give a man a power to appoint portions to be paid to or in favour of children who do not live to want them, not, be it observed, who cannot possibly live to want them, that is not the way in which the rule is stated, but the validity of the appointment is to be tried by the event whether the child actually lives to want the portion. According to the supposed rule, if you appoint a portion to a child to vest immediately, then if the child lives to want it the appointment is good, but if it turns out that the child does not live to want it then, though the appointment may have been good for many years, for the child may have been one year old and may have been maintained for twenty years out of the income, still if the child dies before he wants the portion the charge sinks into the inheritance. If that is so it comes to this, that every power for raising portions, in whatever way it is expressed, is subject to this limitation, that the portions are not raisable under it unless the children live to want them.

Now, we must first of all see whether any such rule of law has been laid down. I asked the learned counsel for the Respondents how they put it, and, with the prudence which I should have expected from him, Mr. *Macnaghten* answered my question by quoting the very words of Lord *Thurlow* in *Lord Hinchinbroke* v. *Seymour* (1), the only case which gives any countenance to the doctrine, and he declined to give any other answer. I think he was quite right in so doing. If a rule is against the general principles of law, the only thing to be looked at is the rule, and if it has been laid down in so many words by any Judge whose decision is binding on the Court, there being no principle to refer to, you can only refer to his words. Now, the words attributed to Lord *Thurlow* are these (the case is reported very shortly): "The meaning of a charge for children is that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time." He does not say you cannot confer a power of raising it, though that was the case of a power. All he says is this, "It is contrary to the nature of such a charge," that is a charge for children. But is that correct? Nobody could possibly say that you cannot direct a charge for children to be raised before it is wanted. Then he comes to the question of

(1) 1 Bro. C. C. 395.

C. A. 1882 HENTY v. WREY. Jessel, M.R.

construction: "And although the power is in this case to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own lifetime if it should be necessary. It would have been very proper so to do upon the daughter's marriage or for several other purposes, but this is against the nature of the power." Now there it is plain that Lord *Thurlow* (supposing the report to be a correct one, though, for reasons I am about to give, I think that it is not) is referring to a question of construction, and he reads the words "to be paid at such times" as meaning to be paid at such time in his lifetime as he should think fit. I cannot so construe the settlement, but that is the way in which Lord *Thurlow* reads it. On the construction of that particular instrument he controlled the words. He did not say that no words would authorize the raising a portion before it was wanted, on the contrary, as I read his judgment, he thought that some words would have done so, but he thought that the words used in that settlement did not. Taking the case as it stands in *Brown*, I cannot see that it lays down any such general rule as suggested; it proceeds, as I read it, on the construction of the particular power. If that be the true view of his decision, there would, but for the circumstances I am about to mention, have been an end of the whole case, because the construction of of those words is not binding upon this Court as to the construction of other words, especially when such other words are so plain as to be beyond the reach of argument.

The case, however, cannot be thus shortly disposed of, for this reason, that writers on the subject and Judges have taken a different view, I may say various different views, of the effect of Lord *Thurlow's* decision, and therefore there was some ground for the judgment given by Mr. Justice *Kay*.

Now when a rule of law which is against principle is alleged to be established, there are two points to be considered, first of all, was any such rule of law ever laid down by any Judge? That is the first point to be decided; and secondly, if it was so laid down, has it passed into a binding rule of law?—that is, has it been so recognised and dealt with by subsequent Judges as to prevent a Judge of a tribunal of co-ordinate jurisdiction from saying that the decision is contrary to the course of law, and is not bind-

ing upon him. As regards the first point, as I have already said, if I look at the case of *Lord Hinchinbroke* v. *Seymour* (1) as reported, I cannot find that any such rule of law as is alleged was laid down in it.

I now go to another point. Did Lord *Thurlow* ever decide the case of *Lord Hinchinbroke* v. *Seymour* in the way appearing in the report? I have come to the conclusion that he did not; that the report is an imperfect and incorrect report, and that the real point decided was that the appointment was in fraud of the power. There is evidence as to this which, to my mind, is quite satisfactory, though I am bound to admit that Judges have differed in opinion as to the ground on which the case was decided. In the first place, I must state what the case was, for I sent for the record and read it. Lord *Hinchinbroke* had married his cousin, daughter of the Earl of *Halifax*, and on his marriage this charge was made on the *Halifax* estate and not on the *Sandwich* estate. *Montague* Earl of *Halifax* settled the *Halifax* estate on himself for life, then to Lord *Hinchinbroke*, his son-in-law, for life, and then it would have gone to the first and other sons of the marriage if there had been any, and in default it went over to a nephew or cousin of Lord *Hinchinbroke*, the infant Defendant *Montague*. Then there was the clause shortly stated in *Brown's* report, providing the £10,000 for the portioning of younger children of the marriage, but in default of appointment there was a limitation of the greatest importance, which is omitted in the report. In default of appointment the £10,000 would have gone to the daughter on her attaining the age of twenty-one or marrying, with a provision for her maintenance in the meantime. So that there was not the slightest suggestion of a reasonable ground for making an immediate appointment to the daughter when an infant of the age of fourteen. In the next place it is said, and I am going to the evidence presently, that the daughter was in a consumption. She died in the next year, as appears from the record, but the consumption does not appear on the record. The only Defendants were *Seymour* and the infant *Montague*. *Seymour* being a bare trustee, merely submitted to the Court whether the appointment was valid, and submitted to act as the Court should

(1) 1 Bro. C. C. 395.

C. A. 1882 HENTY v. WREY. Jessel, M.R.

direct; and the other Defendant being an infant did not state, as he was not bound to state, any defence whatever, but merely stated his infancy and submitted his rights to the protection of the Court. So that it does not appear upon the record what the real defence was. On the other hand we have evidence, to which I shall presently refer, which I think places it beyond all question that the daughter was in a consumption, and was known to be so. We have then a girl of fourteen in consumption. We have a provision of £10,000 made for her to which, without her father's doing anything, she would have been entitled on her marriage or attaining age, with maintenance in the meanwhile, and we have her father executing an appointment by which this sum, chargeable not on his family estate but on an estate which, subject to his life interest, belonged to another family, was given to her immediately, so as to be raisable immediately, obviously with the view of obtaining the money for himself. As soon as she dies he takes out letters of administration and then files a bill to raise the charge. It was inevitable under those circumstances that the charge should be treated as created in fraud of the power. But there is one more observation. The Plaintiff was alive. He could not give evidence of his intention no doubt as the law then stood, but his counsel could have said what his motive was, if he had any motive to suggest which would help his case. Of course he could not state any. It was quite obvious what the motive was. It could not have been for the benefit of the child, because she was already provided for. It was as plain a case of gross fraud on the power as can well be imagined. An observation has been made by the learned counsel for the Respondents which I will notice. The bill was dismissed without costs. I am sorry that it was, because the result was, as very generally happens when a bill is dismissed without costs, that the decree was never drawn up; but, whichever view was taken, the bill ought to have been dismissed with costs, whether the decision turned upon construction or rule of law or fraud on the power. The costs should have followed the event. No doubt the explanation of it is that it was a family suit, and no costs were asked for. The fact of the dismissal being without costs throws no light upon the ground of the decision.

Now as to the evidence which has satisfied me as to the ground of the decision. The first thing is the statement by Lord *Eldon* in *M'Queen* v. *Farquhar* (1). In 1784, when *Lord Hinchinbroke* v. *Seymour* (2) was decided, Lord *Eldon* was at the Chancery Bar, and I may mention that there were very few gentlemen practising at the Chancery Bar in those days, and very few causes in which they could practise. Lord *Eldon* may have been counsel in the case for aught we know, and at all events it is very improbable that he had not personal knowledge of what took place. I sent for a law list to see whether Sir *Anthony Hart* was at the Bar at that time, and I found, rather to my surprise, that the whole Bar of *England* in 1783 (there is no list for 1784) was under 300, practising and non-practising, and therefore one may imagine the small number there were at the Chancery Bar, and how very unlikely it is that Lord *Eldon* had not personal knowledge of what occurred. I am satisfied that he had, and that when he states what occurred he states it of his own knowledge. That being so, he tells us this, at p. 479: "It is truly said, this Court will not permit a party to execute a power for his own benefit. In *Lord Sandwich's Case*" (Lord *Hinchinbroke* became Lord *Sandwich* in 1792, and consequently Lord *Eldon* in 1805 correctly speaks of him as Lord *Sandwich*) "a father having a power of appointment, and thinking one of his children was in a consumption, appointed in favour of that child. And the Court was of opinion that the purpose was to take the chance of getting the money as administrator of that child." Speaking for myself, I prefer Lord *Eldon's* statement in 1805 as to what the judgment of Lord *Thurlow* was, to a report in *Brown*, if I must choose between the two. But Lord *Eldon* mentioned it again in the *Queensberry Case* (3). He says this: "We have in our own law cases where men acting according to their powers may abuse them as to the objects of the powers. These are difficult cases to decide, and the Judges should take care they are not misled by the idea that because powers may be abused, there has been in the cases put abuse of the powers." (I read that with a view to the second point in this case). "A noble lord in one of the cases of this kind had a power of appointing a

(1) 11 Ves. 467, 479. (2) 1 Bro. C. C. 395.
(3) 1 Bli. 339, 397.

C. A. 1882 HENTY v. WREY. Jessel, M.R.

certain sum of money among his younger children under a settlement. He made an appointment to one of those children who was at that time at death's door in a consumption. What was the object of this appointment? It was that if the child died the father should take out administration to that child and claim the estate himself. That was according to the letter of the power, but the Court said that should not be, because it was substantially an appointment to himself and not to that child." As Lord *Eldon* was speaking in the House of Lords there was an obvious reason for not mentioning the noble lord's name, but that the case referred to was the case of *Lord Hinchinbroke* v. *Seymour* (1) appears from a note of the reporter of the House of Lords, who knew perfectly well what was meant, and put at the foot of the page "Case of Lord *Sandwich*." Therefore we have Lord *Eldon* for the second time stating that the decision was that the appointment was a fraud on the power, and stating in particular that the child was in a consumption. In the first case he said that the father thought so, and in the second case he said that it was so. I think, therefore, that I am justified in saying without more that that was the true view of the case.

However it is right for me to say that other views have been taken by other Judges, not of the same authority as Lord *Eldon*, but still Judges whose decisions are entitled to consideration and respect. Sir *Anthony Hart* was also in practice in 1784, and might have had personal knowledge, and he in *Edgeworth* v. *Edgeworth* (2) takes a different view. That case is a very curious case, in which, by some mode of construction which it is rather difficult to follow, Sir *Anthony Hart* found the word "reasonable" to pervade the whole power, and then held that the appointment was not reasonable. Whether that is right or not is another question. Of course the difficulty is that the person to judge of the reasonableness is not the Court but the appointor. At p. 334 he says: "In *Lord Hinchinbroke* v. *Seymour* the father had power to direct portions for younger children to be raised in his lifetime or after his death." That is adopting the construction which Lord *Thurlow* is stated in *Brown's* report to have put upon the power, which directed that the portions should be paid at such times as the

(1) 1 Bro. C. C. 395. (2) Beat. 328.

appointor should appoint. "He directed the portion of an infant daughter to be raised immediately, and she having died, he claimed the money as her administrator, but his bill was dismissed. Lord *Thurlow's* judgment is in these terms," and then he reads the judgment as given in *Brown's* report: "It has been said that Lord *Eldon* in *M'Queen* v. *Farquhar* (1) has impugned that authority by intimating that there was a circumstance of fraud in the appointment, for that the appointee was in a dying state, so that the appointment was in effect for the father's own benefit; there was that circumstance in the case," (He states that also as a fact. We have not got the evidence and cannot verify the statement.) "and it was relied on in the defence" (that he states as a fact, and, as I have said, he was a contemporary and might have heard of it), "but I cannot think that Lord *Thurlow* would have been silent as to the fraud, if it had constituted the ground of his judgment." Now Lord *Eldon* says twice that Lord *Thurlow* decided the case upon that ground. I think, therefore, that Sir *Anthony Hart* did not know what the judgment was. He goes on, "I imply from his language that he decided the case on a principle applicable to every power of that nature, and intended to lay down the rule of law generally, and not to make that case an exception to a rule." Then he goes on to several other cases which certainly do not justify the doctrine, and which I need not read. Therefore it comes to this, that Sir *Anthony Hart* states it to have been a fact, proved in evidence, that the child was in a consumption, and that this fact was relied upon as a defence, but he doubts what Lord *Eldon* says as to its being the foundation of the judgment, because he takes the report in *Brown* to be accurate; but, as I say, I prefer Lord *Eldon's* statement that "the Court said that the appointment was a fraud upon the power, and decided the case upon that ground. That finishes the evidence we have as to what occurred before Lord *Thurlow*, and my opinion is, as I said before, that Lord *Thurlow* decided as Lord *Eldon* says, and the contrary view is against probability. Why should Lord *Thurlow* go out of his way in such a plain case of fraud on the power to decide the case on the ground of a supposed rule of law? Whereas if you take the observations reported by *Brown* as part of the judgment shew-

(1) 11 Ves. 467, 479.

C. A. 1882 HENTY v. WREY. Jessel, M.R.

ing the nature and object of the power, and supporting the conclusion that the appointment was in fraud of the power, you find the whole judgment reasonable and sensible.

There are two other authorities to which I must refer, because they bear upon the second portion of my observations, and that is as to the way in which the decision has been treated by subsequent Judges. Assuming for this purpose that the report in *Brown* is substantially accurate (which I think it is not) we must consider what has been the mode in which the supposed rule of law has been dealt with.

The first observation I have to make upon that branch of the case is this, that no one has ever heard of a case in which the supposed rule has been acted upon. No case has been produced in which a charge under such an appointment has been set aside, except the case before Lord *Thurlow*. Then Lord *Eldon's* observation is of weight, because even supposing him to have been wrong in his recollection as to what Lord *Thurlow* said, still we have his opinion that that was the ground of the decision. He does not recognise it as a decision on the supposed rule of law, but treats it only as a decision on the ground that the appointment was in fraud of the power. His observations therefore would impair the authority of the case even assuming that he was not accurate in his statement of the ground on which the decision went. It must be remembered that where we have conflicting decisions of two Lord Chancellors the decision of the subsequent Lord Chancellor is entitled to greater weight, because the subsequent Lord Chancellor could overrule the decision of the prior Lord Chancellor, and sometimes did. It has not been the practice of modern Courts to exercise the jurisdiction quite so freely as the old Chancellors did, but they overruled one another and sometimes they overruled their own decisions without the slightest doubt or hesitation. There are remarkable cases even in modern times in which a Lord Chancellor has overruled the decision of his predecessor. One of the most remarkable is one of the earlier cases heard before Lord *Lyndhurst*, where he varied a decision of Lord *Eldon's*. There is no doubt about the jurisdiction or about its being exercised.

Now the next case to which I must call attention is very

important as being a decision of Lord *St. Leonards*, the author of the best known text-book on Powers. I shall not read the passages on this subject in his book on Powers. They are not as distinct as might be, but if he had said nothing else on the subject I should have thought, notwithstanding a note to one of the passages, that he took the view that *Brown's* report was correct, and that the case was decided upon some general principle applicable to powers and not on the ground of fraud on the power. But we have a case before him which is twice reported, *Keily* v. *Keily* (1). I would mention that where there is a distinction between those reports I always prefer *Connor* and *Lawson*. There is no substantial distinction between them in this case, though there is a slight difference. We have here a very carefully considered judgment, in which Lord *St. Leonards* states his view of *Lord Hinchinbroke* v. *Seymour* in clear, distinct, and unmistakeable terms; and of course an opinion given in a judgment after argument is to be preferred to a note in a text-book. In both reports he distinctly treats the case as decided on the ground that the appointment was a fraud on the power.

That concludes what I have to say upon the subject of *Lord Hinchinbroke* v. *Seymour* (2), with one exception, and that is *Wellesley* v. *Earl of Mornington* (3). Lord *Hatherley* there considers the case and states that Lord *Thurlow* does not put his decision upon the ground of fraud. He therefore thought that the report of Lord *Thurlow's* judgment in *Brown* was right. It does not appear that his attention was called to the *Queensberry Case*, and all I can say is that he adopts the view of Sir *Anthony Hart* and does not adopt the view of Lord *St. Leonards*, if the case of *Keily* v. *Keily* (4) was called to his attention, which I do not think that it was.

That is the state of the authorities. What do they come to? I have dealt with the first point as to the correctness of the report of *Lord Hinchinbroke* v. *Seymour*, and will now deal with the second. Can it be said that this alleged rule of law, so contrary to principle, has been so recognised and dealt with that a

(1) 4 Dru. & War. 38; 2 Con. & Law, 334.
(2) 1 Bro. C. C. 395.
(3) 2 K. & J. 143.
(4) 2 Con. & Law, 334.

C. A. 1882 HENTY v. WREY. Jessel, M.R.

Court of co-ordinate jurisdiction is bound by it? I think not. Lord *Eldon* and Lord *St. Leonards*, two of the highest authorities upon the subject, state that the decision is to be referred entirely to another ground. On the other hand, there are no doubt great authorities, Sir *Anthony Hart* and Lord *Hatherley*, when Vice-Chancellor, taking a different view. The two higher authorities —higher in this sense, that Lord *Eldon* was higher than Lord *Hatherley*, because Lord *Hatherley* was then only Vice-Chancellor and Lord *Eldon* was Chancellor, and Sir *Edward Sugden* was higher than Sir *Anthony Hart*, because he was the subsequent Chancellor in *Ireland*—take the opposite view.

There is only one other point to be considered—what do the text-books say? It is always very important when you want to know whether a rule of law, however erroneous, has been established, to see whether it has been accepted by the profession, and although the text-books do not make law they shew more or less whether a principle has been generally accepted. I have already mentioned Lord *St. Leonards'* book on Powers, and I will next refer to Mr. *Chance's* very learned treatise, which is remarkable for this, that there is hardly any point on the law of Powers that is not discussed there. The case of *Lord Hinchinbroke* v. *Seymour* is there discussed first of all at page 141, placitum 369: "In regard to *Lord Hinchinbroke* v. *Seymour* (1), it arose on an appointment of a portion to a consumptive minor; the appointment was avoided though the power expressly left the times of raising in the donee's discretion. Such a case, however, perhaps merely shews, what is sufficiently clear, that the letter of a power contrary to its evident spirit and intention is not to be abided by, it presents no such difficulties as are involved in the main point under consideration, difficulties which in many cases at least might be nearly as great as those arising under the doctrine of illusory appointments." What he is referring to is the difficulty of controlling the execution of powers as to a minor. Then he discusses it again at page 463, placitum 1298: "The fact as to the daughter having been in a consumption does not appear in *Brown*, though there can be no doubt of the fact, Lord *Eldon* having on two several occasions so stated the case. In that view

(1) 1 Bro. C. C. 395.

the appointment, in the absence of particular family circumstances to justify it, can scarcely be viewed in any other light than as a gross fraud, and it may be thought extraordinary that the bill should have been dismissed without costs. It does not appear whether there was any limitation in default of an appointment, though it seems probable that there was." As I have already stated, there actually was. Of course that very much strengthens the case as put by Mr. *Chance*. Then he goes on: "Even though the settlement in *Lord Hinchinbroke* v. *Seymour* (1) should have contained no limitation in default of an appointment, still if the child had attained twenty-one it probably would be difficult, notwithstanding her ill state of health, to consider the appointment as void. Sir *Edward Sugden* has classed this decision with cases where the point has been whether the period has arrived for the due execution of the power; there appears, however, to have been no objection to the execution of the power of appointment at the period in question, the error was in the direction that it should vest and be raised before the object required it." I think one may say that, whatever view may be entertained by other people, Mr. *Chance* does not treat the case as decided on the ground of the alleged rule of law, but on the ground of fraud in exercising the power. The last book I shall refer to is that of a living writer, Mr. *Farwell's* treatise on Powers. He refers to *Lord Hinchinbroke* v. *Seymour*, and at p. 326 he says: "Powers are fraudulently executed if the execution was made for a corrupt purpose. A simple sample of this is where the appointor intends a benefit to result to himself. In *Lord Hinchinbroke* v. *Seymour* there was a power in a settlement to raise a portion for a younger child at such time as the parent should direct; he directed it to be raised when she was fourteen, she shortly afterwards died, and the bill of her father as her administrator to have the portion raised for his own benefit was dismissed." There again the case is classed under fraudulent exercise of power. I think I have said enough to shew that the rule (I should rather say supposed rule, because I do not think it was ever laid down by Lord *Thurlow* at all) being against principle and against the course of decisions, which say you are to interpret instruments according

(1) 1 Bro. C. C. 395.

C. A. 1882 HENTY v. WREY. Jessel, M.R.

to the ordinary meaning of their words, unless there is a context to control them or unless the ordinary meaning leads to an absurdity, would not be binding upon this Court, even if the report in *Brown* were correct and not questioned in the way I have shewn. I am of opinion, therefore, that the decision of Mr. Justice *Kay* cannot be maintained on the ground of the supposed rule of law.

But the learned Judge goes on to say (1), "If it were necessary to go further, I must say I think the facts are sufficient to raise what Vice-Chancellor *Kindersley*, in the passage I have read, calls a 'judicial inference' that the intention of the appointor in making the portions to vest immediately was to secure a possible benefit to himself. He had three daughters and no son. A year after the birth of the last daughter he makes this charge, to vest immediately, upon an estate which if no son should be born to him would go to other persons. I cannot see any reason why these portions should be directed to vest immediately except to benefit himself. The portions would not be raisable till his death. He gave maintenance only from that time, and directed that they should be payable at twenty-one or marriage. He did not provide for any advancement meanwhile." As I said before, this point was abandoned by the learned counsel for the Respondent. Now, I must say with the greatest deference to the learned Judge, that I never saw a case in which there was less ground for presuming a fraud. Fraud is not lightly to be presumed or inferred. In all cases in which fraud is inferred there must be such cogent facts that the Court cannot reasonably come to any other conclusion. I think that there were such facts in the case of *Lord Hinchinbroke* v. *Seymour* (2), and I have mentioned what they were. But I will now examine the facts of this case. It is quite true that the appointment was made a year after the birth of the youngest child, but there were two other children, and it is quite true that the appointment was made to them as tenants in common, but if there had been no appointment the children would have been unprovided for, there being no gift to them in default of appointment. It was, therefore, not only not to be inferred that the appointor made the appointment to

(1) 19 Ch. D. 505. (2) 1 Bro. C. C. 395.

benefit himself, but it was to be inferred that he made it to benefit the children. The next point is a remarkable one. The learned Judge refers to one child being one year old. But there were three children. Did the father expect the three children to die in his lifetime? Why should he? It has been laid down over and over again that even in a will the legatees are assumed by the testator to survive him. Does a father assume that his children will die? There is not a scintilla of evidence to shew anything of the kind, that he assumed it or that he had any ground for assuming it. The child, who was one year old, no doubt died afterwards, but not until fifteen years afterwards; and the other child, who was then four years old, died afterwards at eighteen years of age. Therefore the times of death do not afford any inference at all that they were likely to die at this early age, and why should the father have such a horrible intention imputed to him that he appointed to his three little daughters on the assumption that they would die in his lifetime and that he would thereby obtain the benefit? I am shocked at such an inference being drawn without any ground whatever. But that is not all. The real appointment that takes effect is not the appointment of 1828, but the appointment of 1832. It was by way of confirmation, but it really was the appointment that took effect. The children were then older, having lived four years after the first appointment. Even if they had been likely to die at the first appointment, there is nothing to shew that they were likely to die at the second appointment. But that is not all. The learned Judge says, "I cannot see any reason why these portions should be directed to vest immediately except to benefit himself." I can see a reason, though that is not necessary. There was a cogent reason for making an appointment to the infants, viz., that if the father died without making an appointment the children would be unprovided for. It therefore was clearly right to make some appointment. Then it may be said he ought to have made the appointment at twenty-one or marriage. I think not. If an appointment was made to the children to vest immediately (and I dare say the precise form of the appointment was determined by the draughtsman) if the father had died on the following day the children would have got maintenance and

C. A. 1882 HENTY v. WREY. Jessel, M.R.

advancement if required, because being the absolute owners the Court of Chancery could have given advancement out of the fund. But more than that, it could have given maintenance out of the capital, and as the interest was only £4 per cent. so that there would be only £400 a year for the three children, as the girls grew older the income might not be sufficient, but if an absolute appointment was made to them the Court could give them maintenance out of the capital; so that there was a very good reason for making the portions vest, at all events immediately on his death, notwithstanding infancy. Of course during his life the case is different, and I will consider that presently. But there is more than that. I spoke of the maintenance being deficient, but there is the other alternative. The children were very young at the first appointment. The £400 a year might not be wanted for maintenance. If the portions vested immediately the surplus of the £400 a year would go to the children and be available for future maintenance when increased maintenance was required. That is another reason for making the portions vest at once. It might be a benefit to the children, and it never would do them any harm.

Now as regards the remark that the appointor did not provide for any advancement. Even that is not correct. It is quite true there is not a power of advancement in so many words, but there is a power for the father to direct the portions to be paid during his lifetime if he should think fit. That is advancement so far as the father is concerned. If he dies there would be a power of advancement independently, but there is in that way a power of advancement. Therefore there really is a reason why, for the benefit of the children, the portions should be made to vest immediately. I do not say that the same benefit could not have been secured to the children in some other way, but that is not the point we have to consider. When you see that there was a reason for appointing portions and making them vest immediately with a view to the benefit of the children, you are not to impute to the father an intention to commit a fraud upon the power. There is not to my mind the slightest ground for imputing any such intention to Sir *Bouchier P. Wrey*. He is dead, and cannot speak for himself, but I have a very strong impression that if he had been

asked he would have said, "I had nothing to do with it. I left it to my solicitor and counsel, and the way in which the appointment was framed was settled by them." Of course that is mere guess, but that, according to my present impression, would be the answer he would give if he were alive. It is sufficient for me to say that I not only cannot see the inevitable inference which the learned Judge spoke of, but any inference at all that there was a fraud upon the power, and I think the point was very properly abandoned on the part of the Respondent.

For the reasons I have given I think the decision cannot stand, and that the appeal must be allowed.

LINDLEY, L.J. :—

In order to determine this case it is necessary to consider three questions. 1. Whether the terms of the power are such as to warrant the appointment? This is a mere question of construction, and is, in my opinion, free from difficulty. The terms of the power are very wide. The power authorized an appointment by will or by a deed, and by a deed revocable or irrevocable. Moreover (and this is important) the donee of the power was expressly authorized to exercise his own judgment, not only as to the time when the appointed fund should be made to vest, but also as to the time when it should be made payable. It would not be right to construe the power more restrictively than its object and words require. There was no provision for the children in default of appointment. An appointment to the children when young was therefore quite justifiable, and although an appointment by will in 1828 or 1832 would have been just as beneficial to them as an appointment by a revocable deed, still the appointor had his choice in this respect, and in the absence of evidence of fraud the Court cannot control his choice. Similar observations apply to the time when the appointed fund is made to vest. This part of the appointment is warranted by the words of the power, and cannot be rejected or treated as invalid on any sound principle of construction. The case of *Edgeworth* v. *Edgeworth* (1), and others of that class, which were relied upon as authorities for construing powers of this kind with considerable laxity, and so as to defeat

(1) Beat. 328.

C. A. 1882 HENTY v. WREY. Lindley, L.J.

all appointments which the donor of the power may be supposed not to have contemplated, will be noticed presently.

2. The next question for consideration is whether the appointment is invalid on the ground of its being a fraud on the power? By a fraud on the power I understand an abuse of it, or in other words an exercise of it for some purpose different from that for which the power was conferred. Now there is no evidence of any fraud or abuse apart from the documents and the state of the appointor's family; and I am unable from those materials alone to come to the conclusion that there was any exercise of the power other than and except a *bonâ fide* exercise of it for the benefit of the children who were its proper objects. Fraud, improper motives, intentions, objects, or purposes, ought not to be presumed, they must be proved, and it would be to proceed on a mere possible assumption, rather than on an inference from evidence, if the Court were to hold the appointment invalid as a fraud on the power, because in the events which have happened the donee of the power has obtained a benefit from its exercise. Had the children all survived him, and lived to attain twenty-one, he would have obtained no benefit from the appointment; and there is no ground whatever for supposing that he made the appointment in the form in which he did make it in anticipation of the early death of any of his children. The ages of the children in 1832, and the fact that they lived some considerable time after that, negative the idea of fraud. I cannot, therefore, come to the conclusion that the appointment was invalid on the ground that it was a fraud on the power. With reference to this point the cases of *Beere* v. *Hoffmister* (1) and *Butcher* v. *Jackson* (2) are important, for although in those cases the powers related to personal estate and not to charges on land, that circumstance is immaterial in considering the question whether fraud is or is not to be inferred from the mere facts that an appointment is made to a person of tender age who dies young whereby the appointor obtains a benefit. The insufficiency of a suspicion as distinguished from proof of fraud in cases of this description, is further illustrated by the older case of *McQueen* v. *Farquhar* (3).

(1) 23 Beav. 101. (2) 14 Sim. 444.
(3) 11 Ves. 467.

The third and last question is whether, assuming the appointment to be valid, the portions of the two children who died young ever became raisable?

There certainly are many cases in the books, and expressions both in judgments and in writings of authors of celebrity, which tend to shew that where portions for children are charged on real estate and the children die in infancy (and if daughters also unmarried) before the time for raising the portions has arrived, in such cases the portions not being required are not raisable and sink into the inheritance for the benefit of the owners of the land on which they are charged. For example in *Lord Hinchinbroke* v. *Seymour* (1) Lord *Thurlow* is reported to have said as follows: "The meaning of a charge for children is that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time. And although the power is, in this case, to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own life, if it should be necessary. It would have been very proper so to do upon the daughter's marriage, or for several other purposes, but this is against the nature of the power." Other language to the same effect will be found in other cases collected in *Edgeworth* v. *Edgeworth* (2). The judgment of Mr. Justice *Kay* in the present case was evidently influenced by these decisions and expressions of opinion, and it becomes important to examine this subject with care and to ascertain the grounds and the limits of this supposed doctrine. An examination of the authorities will shew that the question now under consideration is intimately connected with the question of construction, and that there is considerable danger of confusion and error if they are not examined separately.

The earliest decision of any importance bearing on this branch of law is *Lady Poulet* v. *Lord Poulet* (1683) (3), which appears by the note in *Raithby's* edition to have been affirmed by the House of Lords. The reason for the decision is not given, though it is obscurely hinted at. However, by comparing that case with *Earl Rivers* v. *Earl Derby* (1688) (4), also affirmed by the House of Lords, and decided the other way, the reasons for both decisions

(1) 1 Bro. C. C. 395.
(2) Beat. 328.
(3) 1 Vern. 204.
(4) 2 Vern. 72.

C. A. 1882 HENTY v. WREY. Lindley, L.J.

become tolerably plain. In both cases a portion for a daughter was charged on land, in both she died under age and unmarried. In the first case the portion was held not raisable, in the second it was held raisable although not wanted by the daughter. The reason for the difference, as is plain from *Lord Rivers* v. *Earl Derby* (1), was that in the first case the portion had not vested in the daughter before she died, whilst in the second case it had.

At the time of these decisions, and for fifty years afterwards, attempts were constantly made to induce Courts of Equity to apply to charges on land the same rules of construction as regards vesting which had been applied by the Ecclesiastical Courts to pecuniary legacies, and the reports of the period, viz., *Precedents in Chancery*, and the two volumes of *Vernon's* Reports, contain many decisions illustrating the different rules applicable to the vesting of these distinct classes of bequests. A charge on land in favour of a person to be raised and paid at a particular time, was held not to vest in him before that time arrived, even although an annual sum for maintenance or even interest was to be paid in the meantime. In cases of this description the charge did not become vested before it became raisable, and if the person entitled to the charge died before that time his executor or administrator could not require it to be raised. *Lady Poulet* v. *Lord Poulet* (1683) (2); *Smith* v. *Smith* (1688) (3); *Yates* v. *Phettiplace* (1700) (4), affirmed by the House of Lords; *Warr* v. *Warr* (5); *Breuen* v. *Breuen* (1702) (6); *Carter* v. *Bletsoe* (1708) (7); *Tournay* v. *Tournay* (1709) (8); *Duke of Chandos* v. *Talbot* (1731) (9); *Boycot* v. *Cotton* (1738) (10) all illustrate this principle. In none of these had the charge vested before the death of the person entitled to it, and in none of them, therefore, was the charge held raisable. The reason was not that the portion was not wanted. The reason was that it had not vested, as is plain from some of these cases themselves, and also from other cases of about the same date in which portions charged on land were held vested. In these cases

(1) 2 Vern. 72.
(2) 1 Vern. 204.
(3) 2 Vern. 92.
(4) 2 Vern. 416.
(5) Prec. in Ch. 213.
(6) 2 Vern. 439, and Prec. in Ch. 195.
(7) 2 Vern. 617, and Prec. in Ch. 267.
(8) Prec. in Ch. 290.
(9) 2 P. Wms. 601.
(10) 1 Atk. 552.

the portions were held raisable, although in some of them the persons entitled to them died too young to require the money. See *Bartholomew* v. *Meredith* (1684) (1); *Earl Rivers* v. *Earl Derby* (1688) (2); *Cowper* v. *Scot* (1731) (3), where the distinction in question is clearly pointed out.

The language of Lord *Hardwicke* in *Boycot* v. *Cotton* (4) may be thought to warrant the conclusion that it is not the time of vesting but the time of payment which is important. He said: "It is settled now, whether the portion charged upon land be given with or without interest by deed or by will if the person dies before the age at which it becomes payable, it shall sink into the estate." This is true where, as in the case before him, the time for vesting and the time for payment are the same, and Lord *Hardwicke* could not have intended the above observation to apply to cases in which those times were different. This, in fact, is apparent from a later sentence in the same judgment in which he says: "Where a portion is given payable at a certain age to one person, and if that person dies, limited over to another without mentioning any age when it should be paid, if the first dies before the time of payment it vests in the second immediately, for it is as to him a new legacy."

Having carefully examined all the older authorities bearing on this subject, I can find nothing unless it be *Lord Hinchinbroke* v. *Seymour* (5) which warrants the notion that a portion, charged on land and vested, is not to be raised if the person entitled to it dies before he or she may want it.

No useful purpose would be served were I to travel through all the cases in the books, and falling under one or other of the two classes above alluded to. The most important of the modern decisions are *Edgeworth* v. *Edgeworth* (6); *Keily* v. *Keily* (7); *Remnant* v. *Hood* (8); *Davies* v. *Huguenin* (9). *Edgeworth* v. *Edgeworth* turned on the force and effect of the word "reasonable" in the power, and the decision was based upon the principle that

(1) 1 Vern. 276.
(2) 2 Vern. 72.
(3) 3 P. Wms. 119.
(4) 1 Atk. 555.
(5) 1 Bro. C. C. 395.
(6) Beat. 328.
(7) 4 D. & War. 38.
(8) 2 D. F. & J. 396.
(9) 1 H. & M. 730.

C. A. 1882 HENTY v. WREY. Lindley, L.J.

an appointment to a young daughter to take effect immediately, even if she died under twenty-one and without being married, was not a reasonable appointment within the meaning of the power. But although *Edgeworth* v. *Edgeworth* (1) can be thus distinguished from the present case it was very strongly contended that the reasoning of Sir *A. Hart*, if applied to this case, would lead to the conclusion that the appointment we have to consider was not authorized to its full extent by the power, and ought to be held invalid so far as it vested the appointed fund in the appointees before they attained twenty-one or marriage. The observations of Sir *A. Hart* must, however, be taken in connection with the language of the power and appointment he had to construe, and it is to be observed that Lord *St. Leonards* in his book on Powers (2) understands Sir *A. Hart* to have held in *Edgeworth* v. *Edgeworth* that the portion had not become vested. As soon as this conclusion is arrived at, difficulties cease. *Keily* v. *Keily* (3) presents no difficulty. The case, however, is valuable as a protest against the doctrine that powers of this sort are not to be construed according to the plain meaning of their language, but according to some supposed intention or rather non-intention of their creators.

Remnant v. *Hood* (4) and *Davies* v. *Huguenin* (5) both confirm and illustrate the distinction made in the older cases. They are both authorities for the proposition that if a portion charged on land is vested it is raisable although the appointee may have since died. No doubt there is considerable difficulty in reconciling all the authorities upon the question when a portion charged on land vests and when it does not, and the Court has often struggled even against the words of an instrument in order to avoid coming to the conclusion that a portion charged on land in favour of a child vested before such child attained twenty-one or married. This is the true explanation of the observations in *Edgeworth* v. *Edgeworth*, *Remnant* v. *Hood*, and *Davies* v. *Huguenin*. But when once the conclusion is arrived at that the portion is vested there is no conflict of authority with respect to the right to

(1) Beat. 328.
(2) 8th Ed. p. 437.
(3) 4 D. & War. 38.
(4) 2 D. F. & J. 396.
(5) 1 H. & M. 730.

have it raised. In the case before us the period of vesting is plainly fixed, and there is no difficulty upon that point if the appointment is held authorized by the power, which for reasons already given I hold it to be.

With respect to the case of *Lord Hinchinbroke* v. *Seymour* (1), I am unable to reconcile it with the other authorities except upon one of two suppositions, viz., either that the appointment was not authorized by the power if properly construed, or that the appointment was a distinct fraud on the power by reason of the known illness of the appointee. Lord *Eldon* (2) understood the case to have proceeded on the latter ground, so apparently did Lord *St. Leonards* (3). *Brown*, however, does not mention this, nor does he notice the important fact that there was a provision for the daughter and her maintenance in default of appointment, which might materially affect the construction of the power. This fact was surmised by although not known to Mr. *Chance*, who has made some valuable comments on the case in his excellent work on Powers (4). The decision in that case was plainly correct, though owing to the way in which it is reported its grounds have been misunderstood on some occasions.

The results at which I have arrived from a careful examination of all the authorities which I have examined are as follows. 1. That powers to appoint portions charged on land ought if their language is doubtful to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is before they attain twenty-one or (if daughters), marry. 2. That where the language of the power is clear and unambiguous, effect must be given to it. 3. That where upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee the portion is not raisable, but sinks into the inheritance. 4. That where upon the true construction of both instruments the portion has vested in the appointee the portion is raisable even although the appointee dies under twenty-one or (if a daughter) unmarried. 5. That appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion;

(1) 1 Bro. C. C. 395.
(2) 11 Ves. 479, and 1 Bli. 397.
(3) 4 D. & War. 55.
(4) Vol. i. p. 463 *et seq.*

C. A. 1882 HENTY v. WREY. Lindley, L.J.

and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so.

Applying these principles to the present case I am of opinion that the appointment was valid, and that the decision of the Court below must be reversed.

Lord Justice *Holker* requests me to say that he has read and concurs in this judgment.

Mr. *Romer*, for *Smith*, the legal personal representative of Sir *B. P. Wrey*, who had also appealed, asked for his costs of his appeal.

It being intimated that the owner of the estate intended to appeal to the House of Lords, *Smith's* appeal was ordered to stand over with a stay of proceedings against him.

Solicitors: *Hadden, Woodward, & McLeod; Morice & Toller; Warry, Robins, & Burges.*

H. C. J.

C. A. 1882 *May* 19.

THOMAS *v.* PALIN.

[1881 T. 110.]

Practice—Motion for Attachment—Indorsement on Order—Cons. Ord. XXIII. r. 10.

On the 20th of May, 1881, an order was made for the Defendants within seven days after service, to file an affidavit as to documents. The copy served had no such indorsement as is required by Cons. Ord. XXIII. r. 10. The Defendants filed successively three affidavits, which were successively held insufficient, and on the 10th of February, 1882, filed a fourth. A summons was taken out to consider its sufficiency, and on its being attended on the 24th of February, the Defendants' solicitor stated that the draft of a further affidavit had been sent into the country, and that the affidavit would be filed as soon as possible, and requested an adjournment. The Chief Clerk refused to adjourn; held the affidavit of the 10th of February to be insufficient, and ordered the Defendants to pay the costs. On the 25th the Plaintiffs served notice of motion for attachment for the 3rd of March. On the 28th of February the Defendants filed a further affidavit, and on the 1st of March asked the Plaintiffs' solicitors whether they proposed to with-

C. A.
1882
THOMAS
v.
PALIN.

draw their notice of motion. The Plaintiffs' solicitors replied that they did not, as their briefs had been delivered before the affidavit was filed, but that they would consider any proposal the Defendants had to make. The Defendants' solicitors wrote in answer making no offer to pay any costs, but saying that they should deliver their briefs.

North, J., refused the motion with costs:—

Held, on appeal, that the Plaintiffs were right in giving their notice of motion, and that as the Defendants had made no offer to pay any costs, the Plaintiffs were entitled to bring on their motion, and must have the costs of it.

Under the practice established by the *Judicature Acts*, it is not necessary that the copy of an order which is served should have the indorsement required by Cons. Ord. XXIII., r. 10, stating the consequences of failing to obey the order.

ON the 20th of May, 1881, an order was made for the Defendants to make and file an affidavit as to documents within seven days from service of the order. This order was served on the Defendants' solicitors on the 28th, and the copy served had no such indorsement as was required by Cons. Ord. XXIII., r. 10.

On the 1st of June, 1881, the Defendants filed an affidavit of documents. On the 5th of July, 1881, the affidavit was held insufficient on the application of the Plaintiffs, and the Defendants were ordered to pay the costs of the application in any event. The time was enlarged till the 12th of July, 1881.

On the 29th of July, 1881, the Defendants filed a further affidavit. On the 29th of November, 1881, this affidavit was held insufficient. The time was enlarged till the 6th of December, and the Defendants were ordered to pay the costs of the application in any event.

On the 10th of December, 1881, the Defendants filed their third affidavit, which related only to three letters mentioned in their first affidavit. On the 31st of January, 1882, Mr. Justice *Kay* held this affidavit insufficient, and made an order that the Defendant should within ten days peremptorily file a further sufficient affidavit as to certain specified documents not including these three letters, and the Defendants were again ordered to pay the costs in any event.

On the 10th of February, 1882, the Defendants filed a fourth affidavit, and a summons was taken out to consider its sufficiency. On the 14th of February, a clerk of the Defendants' solicitors

C. A. 1882 THOMAS v. PALIN.

asked the clerk of the Plaintiffs' solicitors, what was wanted, and on the 15th was informed that an affidavit as to the three letters referred to above was required. The managing clerk of the Defendants' solicitors thereupon prepared the draft of a further affidavit, and sent it to *Shrewsbury*, where the Defendants resided. On the 24th of February the summons was attended, and the managing clerk of the Defendants' solicitors stated to the Chief Clerk that a further affidavit was in draft; that he had sent it down into the country, and that it would be returned and filed at the earliest possible moment, and asked that the summons might be adjourned. The Chief Clerk refused to do this, and proceeded to consider the affidavit of the 10th of February, which he held to be insufficient as regarded the three letters above referred to, which now formed the only ground of dispute, and made an order that the Defendants should pay the costs of the application in any event, the order saying nothing about any further affidavit.

On the following day the Plaintiffs served the Defendants personally with notice of motion for the 3rd of March, for attachment. On the 28th of February the Defendants filed a further affidavit, and sent the Plaintiffs' solicitors a copy on the same day. On the 1st of March, the Defendants' solicitors wrote to the Plaintiffs' solicitors to ask whether they proposed to withdraw their notice of motion. The Plaintiffs' solicitors replied that they did not, their briefs to counsel having been delivered before the affidavit was filed, but that if the Defendants' solicitors had any proposal to make on the subject they would give it consideration. The Defendants' solicitors made no offer to pay any costs, but stated in reply that they should deliver their briefs.

The motion was made on the 3rd of May, 1882, before Mr. Justice *North*, who refused it with costs. The Plaintiffs appealed.

S. Hall, for the Appellants.

Romer, Q.C., and *Brett*, for the Defendants:—

The Judge considered that this motion was not made for any *bonâ fide* purpose, but only in order to inflict costs, and on that ground he refused it.

[JESSEL, M.R.:—Was not his Lordship under a misapprehension as to the practice? Notice of motion was given at a time when you clearly were in contempt. Were you not bound to tender costs if you wished to prevent the motion coming into Court?]

The briefs were delivered more than two clear days before the time for hearing the motion, and this was premature, as was laid down by Lord *Hatherley* in *Hughes* v. *Lewis* (1).

[JESSEL, M.R.:—His Lordship never meant to lay down any hard and fast rule of that kind. It depends on the nature of the case how long beforehand it is reasonable to deliver a brief, and the Taxing Master decides it.]

Then we say, that an attachment could not be founded on the order of the 20th of May, 1881, for it was not indorsed in manner required by Cons. Ord. XXIII., rule 10.

[JESSEL, M.R.:—That rule is not now in force.]

It is submitted that sect. 21 of the *Judicature Act*, 1875, preserves it.

JESSEL, M.R.:—

I have been sorry to see questions raised in this case which I considered to have been settled long ago, and which were treated as settled very early in my professional career. When a man is in contempt, and notice of motion to commit him for that contempt is served, and he clears his contempt before the motion is heard, he has a very plain course open to him. He can go to the other side and tender them a sum for costs, or he can say I will pay the taxed costs. Then if after that the other side go on they do so at the peril of costs. The point was constantly occurring in my early days on motions to dismiss bills for want of prosecution. The plaintiff who received notice of motion to dismiss knowing that he was out of time, went to the solicitors of the defendant giving the notice and said, "We will give you so much for costs." If the defendant's solicitors said, "That is not enough, we have delivered our briefs," the plaintiff's solicitor would say, "Tax your costs;" and the Taxing Master then decided whether the

(1) Joh. 696. 6 Jur. N.S. 442

C. A. 1882 THOMAS v. PALIN. Jessel, M.R.

briefs had been delivered prematurely or not. That question was for him, and not for the Court. If in such a case, or in a case of a motion to commit for contempt, the Taxing Master thought that the moving party had delivered his briefs prematurely, he disallowed them as being delivered for the purpose of making costs, but if he thought they were fairly delivered he allowed them. The Judge was never troubled with those questions.

This case is a lamentable instance of culpable delay somewhere. I have a strong impression that the delay arises in the country and not in town. On the 20th of May, 1881, an order for the common affidavit as to documents was obtained in a case in which, as far as I can see, there were not many documents nor anything to require much time for complying with the order. Five successive affidavits have been made, four of which at all events are insufficient, the last of the four being filed on the 10th of February, 1882. Those affidavits have been made in a not very heavy case, and where the parties reside at the not unknown town of *Shrewsbury*. It is plain there has been a great deal of culpable delay somewhere. In that respect, therefore, the defendants appear before the Court in an unfavourable light. The last affidavit having been made on the 10th of February, a summons was taken out to consider its sufficiency. The Defendants asked on the 14th of February what was wanted, and on the 15th of February they were told that an affidavit was wanted as to three particular letters. Thereupon the Defendants' solicitors' managing clerk prepared an affidavit and sent it into the country. On the 24th the parties went before the Chief Clerk, and there is no conflict of evidence as to what took place before him. The managing clerk for the Defendants' solicitors, that is the town agents' clerk, said he had sent down the draft affidavit, and expected it to be returned immediately, and that it would be filed at the earliest possible moment. He therefore asked the Chief Clerk to adjourn the summons and give further time. The Chief Clerk refused to do so, considering, I suppose, that the Defendants had had time enough; and he held the affidavit of the 10th of February to be insufficient, and directed that the Defendants should pay the costs in any event. On the next day notice was given of a motion for an attachment, the Defendants

being in contempt for not complying with the order of the 20th of May, 1881. I pass over the intermediate affidavits and orders, which are immaterial. Then on the 27th of February the Defendants' solicitors get a further affidavit, they seem to assume that it is sufficient, and on the 28th they file it and send a copy to the Plaintiffs, the notice of motion having been given for the 3rd of March. They never made any offer to pay any costs, but simply asked the Plaintiffs to accept the affidavit. The Plaintiffs say, "No, we shall go on with the motion as we have delivered our briefs, but we will listen to any proposal." They get no proposal, but are set at defiance, and under these circumstances they bring on their motion.

The first point to be considered is, whether the Plaintiffs were right in giving notice of motion when they did. Plainly they were. At that time there was no sufficient affidavit, further time had been refused, and the Defendants were in contempt. The only mode of obtaining a sufficient affidavit was to move for an attachment. The Plaintiffs could not take out any further summons for insufficiency, because that had been decided; and their only remedy, if they wanted a further affidavit, was by motion for attachment. It is very easy to say that a motion is made for the purpose of making costs, but there is no affidavit to that effect, and nothing to impeach the *bona fides* of the Plaintiffs, when they say that they want the three letters accounted for. But supposing one motive was to get costs that cannot prevent their being entitled to move. Solicitors are generally actuated by two motives, one to serve their client and another to put costs into their own pockets. These are the usual motives. I never heard that solicitors acted only for the purpose of serving their clients without any regard to their own personal profit. I thought they carried on business for their own profit, not forgetting their primary duty to their clients. The notice was properly given and with a proper object, and to put costs into the pockets of the solicitors which it is their business to obtain. Supposing the affidavit had been sufficient the duty of the Defendants was to have said, "We will pay you a sum in lieu of costs, and if you refuse to accept that offer then we will take an order to tax." Then the Taxing Master would have decided the point between

C. A. 1882 THOMAS v. PALIN. Jessel, M.R.

them. I think the Defendants must pay the costs of the motion, because they have been wrong from beginning to end.

As regards the affidavit filed on the 28th of February, I am bound to say that in my opinion it not only is not sufficient, but is so obviously not sufficient that I am surprised that anybody should have thought it sufficient. [His Lordship then stated his reasons for holding it insufficient.]

That being the position of matters, the Plaintiffs say that they want a further affidavit, but will be satisfied with an affidavit from the Defendant Mr. *Peele*, the solicitor, if he will make a proper one. Therefore, so far as he is concerned, the motion will stand over for a reasonable time to enable him to make the affidavit, but in any event he and the other Defendants will pay the costs of the motion.

There is in the case another point of some importance. The copy that was served of the original order had no indorsement on it. According to the old Chancery practice (Cons. Ord. XXIII. r. 10) it was necessary that the copy served of every order requiring a thing to be done within a limited time should have an indorsement telling the person who was required to obey the order the consequences of not obeying it. This was not the practice at common law. At common law whether a time was limited or not there was no indorsement on the judgment, and a man had to look out for himself as regards a *fi. fa.* or any other process for disobedience. The question is, What is the rule under the *Judicature Act*? Before that Act you could issue an attachment without notice, but now you cannot. Therefore as a plaintiff could under the old practice issue an attachment as a matter of course, it was very important to see that the defendant knew that he was liable to be attached. Under the present practice he has notice, and if he comes to the Court and gives an excuse for non-obedience to the order the Court will listen to him. Every man served with an order of the Court must know that it is not a *brutum fulmen* but will be enforced somehow, and that the Courts do not make orders which cannot be enforced. When an attachment is moved for the party will be heard if he has any reason to give why he should not be attached. There is not the same occasion to let him know to what he is liable as there was

when the attachment could be issued *ex parte*. Independently of that, where there is no provision in the general orders as to the practice in any particular case, and when the rules of practice at Common Law and in Equity do not agree, the Court of Appeal has laid down that the more convenient practice is to be adopted, and the more convenient and simple practice is to let the order go without indorsement, and avoid the unnecessary trouble and expense of putting an indorsement on every order. The objection grounded on the absence of indorsement therefore cannot be maintained.

LINDLEY, L.J.:—

I will deal first with the point as to the omission of the indorsement. When the indorsement was required by the old rules in Chancery, it gave persons notice of what would follow, supposing the order was not obeyed, that is to say, that they would be liable to be attached, &c. That indorsement if put on now is not true in the sense in which it was true under the former practice; for a party is not now liable to be attached for disobedience in the same sense as before, that is without notice. A party cannot now be attached without notice, and there is therefore no necessity for telling him that he will be liable to be attached. As regards sequestration indeed, the reason does not apply, for a sequestration issues without notice, and there might therefore be some use in retaining the indorsement as regards sequestration. It would, however, be wrong to establish a different practice in different divisions of the High Court, for to do so would upset the whole scheme of the Act. Now at Common Law an indorsement was not necessary, and as the rule making an attachment issue only upon notice has removed the principal reason for requiring the indorsement which was necessary under the old Chancery practice, I think that we ought to hold an indorsement to be no longer required.

Then as to the merits of the case, it appears to stand in this way. There was the common order for discovery made as long ago as the 20th of May, 1881, which has never been properly complied with. There was, on the 31st of January, 1882, a peremptory order fixing the time within which a full and sufficient affidavit should be made. That peremptory order was not

C. A. 1882 THOMAS v. PALIN. Lindley, L.J.

drawn up at that date. I attach importance to that, because if it had been drawn up at once, considering the mode in which it is worded, I should have thought it might have misled the Defendants. It is quite obvious from the letters which passed, and the facts proved in evidence, that they knew perfectly well before the 24th of February last that what was required was not only a further affidavit as to the particular documents referred to in the order of the 31st of January, 1882, as ultimately drawn up, but also as to the three letters, though that does not appear from the terms of the order. On the 24th of February the Chief Clerk found that the four affidavits which had been filed were insufficient, and he declined to give further time. The matter then stood thus:—There was the order of the 20th of May, 1881, which had never been obeyed, and there had been four insufficient affidavits. There seems to have been some talk, more or less loose, about putting in a further affidavit, but none was put in till the 28th. In the mean time, on the 25th of February, the Plaintiffs served a notice of motion for attachment which was technically and strictly right. That being the case, it is a little surprising that the motion for an attachment should have been dismissed with costs. If the Judge had thought that there was sufficient reason for making no order about costs, I could have understood it, but the Plaintiffs being technically right, there being four insufficient affidavits and no constat that there would ever be a sufficient one, they were justified and quite right in trying to enforce a further affidavit by bringing on their motion. I am not satisfied that it was not a *bonâ fide* application, and I do not think that we ought to come to the conclusion that it was an application merely for costs. I think it was an honest effort to get a further affidavit from persons who having filed four insufficient affidavits in three-quarters of a year, gave the Plaintiffs reason to be somewhat suspicious. The order of the Court below must be discharged and the Defendants must pay the costs of the motion here and below, and Mr. *Peele* must make a further affidavit within three weeks.

Brett asked to be allowed to address the Court on the question of the premature delivery of the briefs.

C. A. 1882 THOMAS v. PALIN.

JESSEL, M.R.:—That would be a question for the Taxing Master, if it arose at all. If you had tendered costs, it would have arisen, and on your taking the objection that the briefs were delivered prematurely, it would have been the duty of the Taxing Master to consider it. But as you made no tender of costs, it was necessary for the Plaintiffs to come to the Court, and for that purpose to deliver briefs, and at what time these briefs were delivered is a wholly immaterial question.

Solicitors for Plaintiffs: *Brownlow & Howe.*
Solicitors for Defendants: *Chester & Co.*

H. C. J.

MAPLE & CO. *v.* JUNIOR ARMY AND NAVY STORES.

C. A. 1882 V.-C. H. *May* 25. C. A. *June* 29.

[1882 M. 1478.]

Copyright—Illustrated Catalogue—Book of Engravings—Copyright Act (5 & 6 *Vict. c.* 45) [*Revised Ed. Statutes, vol. viii. p.* 1152].

The Plaintiffs, who were upholsterers, published an illustrated catalogue of articles of furniture which was duly registered under the *Copyright Acts* as a book. The illustrations were engraved from original drawings made by artists employed by the Plaintiffs, but the book contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale, but was used by the Plaintiffs as an advertisement. The Defendants published an illustrated catalogue, many of the illustrations in which were copied from those in the Plaintiffs' book:—

Held, by the Court of Appeal (affirming the decision of Vice-Chancellor *Hall*), that the Plaintiffs were entitled to an injunction restraining the Defendants from publishing any catalogue, containing illustrations copied from the Plaintiffs' book.

A collection of prints published together in a volume is a book within the meaning of the *Copyright Acts*, and the proper subject of copyright, though it contains no such letterpress as could be the subject of copyright, and it makes no difference that the book is not published for sale but only used as an advertisement.

Cobbett v. *Woodward* (1) overruled.

THE Plaintiffs, who were upholsterers, cabinet makers, and general dealers in furniture, printed in 1881 an illustrated catalogue containing prints of the articles of furniture sold by them. This

(1) Law Rep. 14 Eq. 407.

C. A. 1882

MAPLE & Co. v. JUNIOR ARMY AND NAVY STORES.

catalogue was a volume of nearly 300 pages, consisting almost entirely of engravings of furniture with short descriptions and prices, and was duly registered at *Stationers' Hall* on the 7th of April, 1881, under the Act 5 & 6 Vict. c. 45. A similar catalogue had been printed in 1878 and registered. The Plaintiffs had also printed similar catalogues before that year, but none of them had been registered.

The course adopted by the Plaintiffs in preparing the catalogue was to select articles of furniture and employ an artist to take sketches of them and engrave them on wood. The expense incurred in preparing the illustrations was deposed to by one of the Plaintiffs as exceeding £4000. The book was not brought out for sale, but was used by the Plaintiffs as an advertisement.

The present action was brought to restrain the Defendants, who also issued an illustrated catalogue, from printing, publishing, issuing, circulating, or distributing any catalogues, circulars, books, or prints containing any plates or illustrations of furniture copied from or being a colourable imitation of the plates or illustrations contained in the Plaintiffs' book called "Illustrated Catalogue of Furniture, *Maple & Co., London*," and published in 1881, and not appearing in any preceding catalogue of the Plaintiffs other than their catalogue of 1878.

Several experts who made affidavits on behalf of the Plaintiffs deposed that they were satisfied on comparison of the catalogues that a large number of the illustrations in the Defendants' catalogue had been copied from those in the Plaintiffs' catalogue by means of photography, the print in each case being transferred by the camera to the surface of a wooden block which was then engraved. This evidence was not met by any counter-evidence.

The Plaintiffs moved for an injunction. The motion was heard before Vice-Chancellor *Hall*, on the 25th of May, 1882.

Hastings, Q.C., and *Beddall*, for the motion:—

The case of the Plaintiffs is that they are the proprietors of an illustrated catalogue of the articles which they manufacture and sell at their well-known establishment in *Tottenham Court Road*, and that the Defendants have issued a catalogue which contains a number of illustrations which clearly have been copied by taking

photographs from the Plaintiffs' book and afterwards transferred to their own book. The Defendants contend that the Plaintiffs have no copyright, but it is submitted that they have. The case of *Cobbett* v. *Woodward* (1) may be cited against them, but it is distinguishable from *Grace* v. *Newman* (2), and that is the authority which shews that the Plaintiffs are entitled to the injunction which they ask for.

If the Plaintiffs establish the fact that some of the pages of the Defendants' book have been copied they will be entitled to their order: *Lewis* v. *Fullarton* (3); *Kelly* v. *Morris* (4). They also cited *Hotten* v. *Arthur* (5).

W. Pearson, Q.C., and *Lewin*, for the Defendants:—

It is submitted that there has not been a proper registration under the *Copyright Act* (5 & 6 Vict. c. 45), s. 13, which requires that a book shall be registered at the time of first publication. As to the edition of March, 1881, it is manifest that with regard to a large portion of the Plaintiffs' book the entry is not true, as it has been published at various dates previously. But the Defendants deny that the Plaintiffs have any copyright at all. The cases referred to were decided at the hearing, and the question now is, is it clear that the Plaintiffs will obtain a decision in their favour at the hearing of the action? Is there a question to be disposed of at the hearing? Looking at the decision in *Bogue* v. *Houlston* (6) it is submitted that there is not. The Plaintiffs must have copyright in the letterpress in order to establish copyright in the designs. If not copyright they do not come within the statute.

Hotten v. *Arthur* has no relevancy to a case like this, or to *Cobbett* v. *Woodward*, and this case is within *Cobbett* v. *Woodward*. *Grace* v. *Newman* is not an authority in this case because the terms of the statute have not been complied with, and consequently there is no copyright. There is no case made upon the facts for an injunction, for the reasons that there is no copyright in such a book—that shews that there is no serious question to be tried at

(1) Law Rep. 14 Eq. 407.
(2) Law Rep. 19 Eq. 623.
(3) 2 Beav. 6.
(4) Law Rep. 1 Eq. 697.
(5) 1 H. & M. 603.
(6) 5 De G. & Sm. 267.

C. A. 1882

MAPLE & Co. v. JUNIOR ARMY AND NAVY STORES.

the hearing of the action; and next, because there has not been a compliance with the provisions of the statute. These catalogues were published before 1878, and a large portion of the book was published before 1881. *Murray* v. *Bogue* (1) was also referred to.

Hastings, in reply:—

The case of *Murray* v. *Bogue* is distinguishable from this case. It is well settled that the Plaintiffs may have an injunction so far as regards the new matter in the edition of 1881, though they may not be entitled to sue in regard to the old matter: *Stannard* v. *Lee* (2). The decision in *Hotten* v. *Arthur* (3) shews clearly that a plaintiff may have copyright in advertisements. There is *primâ facie* ground for an injunction, and the Defendants should be ordered to keep an account.

HALL, V.C.:—

As to the questions which have been discussed in this case, it may, without doubt, be said that they have not been finally set at rest by any of the decisions which have been referred to. These questions will probably be again submitted to the Court either here or elsewhere. I shall upon the present occasion found my decision upon what I consider to be the state of the law to be collected from the decisions which have been commented upon, and having regard to the fact that this being an interlocutory application and not the final hearing, it will be right to consider the balance of convenience on the one side and on the other.

As regards the merits of this case, judging of them for the present purpose, and looking at the facts as stated in the evidence, I consider it is substantially made out that, to a very large extent, the Defendants have copied from the books, and availed themselves of the labours and expenditure of the Plaintiffs. That being so, it certainly does not incline one to do otherwise than put the case in a state in which, according to honesty and the rectitude of proceedings on the part of the public, it ought to be put. Even in the case before the Master of the Rolls where he refused the main part of the application he would not give the

(1) 1 Drew. 353. (2) Law Rep. 6 Ch. 346.
(3) 1 H. & M. 603.

defendant his costs in the action, to which he would have been entitled as a matter of course, if he had succeeded in the main part of his defence, by reason of his having acted in such a way as the Master of the Rolls thought was not fair and right as between man and man. In the case of *Grace* v. *Newman* (1), I said "it does not appear that the case of *Hotten* v. *Arthur* (2) was mentioned to the Master of the Rolls, and whether if it had been, his Lordship's decision would have been different it is difficult to say."

I see no reason to think otherwise now. Nor do I see any reason to think it improbable that if *Hotten* v. *Arthur* had been called to his attention he would have said "I cannot agree to the proposition that an advertisement cannot be the subject of copyright." I think, so far as my judgment is concerned, that the proposition I have referred to was not a correct one; and the Master of the Rolls thought it was at the bottom of the case before him. Now can there be copyright in an advertisement? It has been submitted that consistently with what I decided in that case, it might be said that there was copyright there, and that this might have sustained my judgment even if it were in other respects wrong; but without stating that there is something equivalent to it in this case in the passages which have been read to me from the catalogue, and in comparing the catalogues, I am certainly prepared to hold that for the present purpose its being an advertisement, considering it as an advertisement, is not a reason why the catalogue is not a book within the meaning of the statute. It is a book in itself, and a book is a thing which the statute protects. There is no clause in the statute which limits the operation of the word "book" in such a way as that it shall not apply to such advertisements. *Primâ facie* therefore I hold that the decisions are in favour of the protection of the statute being extended to such advertisements. As to the other points which have been discussed, I consider that for the present purpose I cannot give weight to them. I mean the distinction taken between first and second editions. It is said, there cannot be copyright for what is in a second edition if there cannot be copyright in the first edition, always assuming that the first edition could

(1) Law Rep. 19 Eq. 623, 626. (2) 1 H. & M. 603.

C. A. 1882 MAPLE & Co. v. JUNIOR ARMY AND NAVY STORES. V.-C. H.

have been made the subject of copyright if it had been properly registered. I hold certainly that that is an unsound argument, and that there can be copyright in two separate editions. Having copyright in the second, the Plaintiffs are certainly not excluded by reason of any failure to establish copyright in the first edition, which, however, I think has not been shewn here. I must consider that copyright exists in both editions. It may be that there are some drawings in these books which are not covered by express evidence pointing to the particular things—not covering each and every one of them. That may certainly be so, but as I am satisfied that a great number of these drawings have been copied into the Defendants' book, I shall certainly hold that the proof, as regards them, is quite sufficient to justify me in restraining the Defendants from publishing these drawings in their book; though there is not any direct evidence or the same actual proof as to every one of them. I shall consider for the present purpose, on the motion for an injunction, that the Plaintiffs' right to protection of his whole book is established. This being only an interlocutory application, I may hear something more of the matter at a future stage of the action. The balance of convenience or inconvenience seems to me to be greatly in favour of the Plaintiffs. They have spent their money upon this book, and the Defendants have availed themselves to a large extent, I am satisfied on the evidence, of that expenditure, and have appropriated the drawings to themselves. Under these circumstances, if ever there should be a question to be determined in reference to damages, I will give no opinion as to how damages should be ascertained, whether by the mere value of the book or in some other way, the number of copies which have sold, or whether there should be taken into account, which I suppose a jury would do, the damages which have been occasioned to one side or the other, as the case may be, by reason of the injunction. Of course, the Plaintiffs on this occasion will give the usual undertaking to be liable for damages.

On the whole case I consider that I can, and that I ought to interfere in favour of the Plaintiffs' application, qualifying the order in the way which has been suggested, *i.e.*, they are not to have any injunction in respect of those drawings which have been published in any book which is not entitled to copyright. That

seems to me to be right. I attach no weight at all to the argument that this is a case in respect of which compliance with the *Engraving Act* ought to have been attended to. I feel no difficulty about that. I do not consider that it is a case of engravings at all, either as coming within or as to the necessity for complying with the *Engraving Act*.

C. A. 1882

MAPLE & Co. v. JUNIOR ARMY AND NAVY STORES.

T. F. M.

The Defendants appealed. The appeal was heard on the 29th of June, 1882.

C. A.

W. Pearson, Q.C., and *Lewin*, for the Appellants:—

We do not dispute that some of the engravings in the Plaintiffs' publication have been copied by the Defendants, but the Plaintiffs have taken no steps to protect them under the Act relating to engravings, and we say that they are not protected by the *Copyright Acts*. The book was not the subject of copyright, for no literary labour was bestowed upon it; it is nothing but a mere priced catalogue illustrated by engravings. Now the object of the Act is only to protect literary work, as appears by the preamble. Where a book is the subject of copyright the engravings are protected as part of the book: *Bogue* v. *Houlston* (1); but if it is not, there is no authority for saying that the engravings are protected. Three cases were referred to below, in one of which the precise point was decided in our favour: *Cobbett* v. *Woodward* (2), where the defendant had cut out prints from the plaintiffs' book which was similar to the Plaintiffs' book in this case, and sent them to his engravers to be copied. It was held that the plaintiff had no copyright, and an injunction was refused. The Vice-Chancellor in the present case relied on *Hotten* v. *Arthur* (3), but there the book contained original matter and was a proper subject of literary copyright, so the case was the same as *Bogue* v. *Houlston*. *Grace* v. *Newman* (4) went on the ground that the book was something more than a mere advertisement, and was a subject of literary copyright.

[JESSEL, M.R.:—I doubt whether *Cobbett* v. *Woodward* was well

(1) 5 De G. & Sm. 267.
(2) Law Rep. 14 Eq. 407.
(3) 1 H. & M. 603.
(4) Law Rep. 19 Eq. 623.

C. A. 1882

MAPLE & Co. v. JUNIOR ARMY AND NAVY STORES.

decided. The introduction was a proper subject of copyright, and if there is any original matter in the book, there is copyright in the book.]

Suppose it contained extracts from old books there would be no copyright in them.

[JESSEL, M.R.:—No; but the copyright extends to all the original matter.]

In order to protect the illustrations they must be connected with the letterpress in which there is copyright.

[JESSEL, M.R., asked Mr. *Hastings* to refer to any parts of the letterpress of the Plaintiffs' catalogue which could be the subject of copyright. Several passages were referred to, but the Court was clearly of opinion that none of them were of such a character that copyright could be had in them.]

We shew old catalogues published before the publication of the Plaintiffs' catalogues in which the same articles appear.

[JESSEL, M.R.:—There was no literary copyright in *Bogue* v. *Houlston* (1). It was a publication of the old story of "*Reynard the Fox*," with new designs, but with no new letterpress.]

There was literary merit in adapting new illustrations to the old letterpress.

[JESSEL, M.R.:—Why should we go out of our way to put a narrow construction on the Act for the purpose of enabling you to pirate your neighbour's catalogue?]

It appears that there were other stories in the plaintiff's book in *Bogue* v. *Houlston*, the book therefore was a proper subject of literary copyright.

[JESSEL, M.R.:—The defendant published only "*Reynard the Fox*," which he had a right to do, and if the illustrations were not protected *per se*, how could they be protected by that story being bound up with original stories, if any such there were?]

The decision is that there was literary copyright—that the book must be taken as a whole, and that there was copyright in all the original matter.

(1) 5 De G. & Sm. 267.

[JESSEL, M.R.:—The decision was that when there is copyright in a book the copyright extends to the illustrations as well as the letterpress.]

The principle deduced by Mr. *Copinger* (1) from the case of *Bogue* v. *Houlston* (2) is that "where there are designs forming part of a book in which a person has copyright such copyright extends to the illustrations and designs of the book equally as to the letterpress." This we submit is the correct view. There is no literary work here, and the cases relied on by the Vice-Chancellor do not contradict *Cobbett* v. *Woodward* (3).

[During the Appellants' argument *Jessel*, M.R., sent for the record in *Bogue* v. *Houlston*, and the result of the examination of it will be found below.]

Hastings, Q.C., and *Beddall*, for the Plaintiffs, were not called upon.

JESSEL, M.R.:—

I am of opinion that this catalogue is the subject of copyright, and that the engravings are protected. In the first place, it is a book, and so clearly comes within the words of the *Copyright Act* of 1842 (5 & 6 Vict. c. 45) s. 2. There may be such things as picture books for those who cannot read letterpress. The preamble of the statute has been referred to, but it cannot restrict the enacting part of the statute if the enacting part is clear, and moreover, the preamble can in no case have much effect unless it is itself clear. Here the enacting part is clear. "The word 'book' shall be construed to mean and include every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published," and "the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." The preamble does not help the Appellants, "Whereas it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting

(1) 2nd Ed. p. 360. (2) 5 De G. & Sm. 267.
(3) Law Rep. 14 Eq. 407.

C. A. 1882

MAPLE & Co. v. JUNIOR ARMY AND NAVY STORES.

Jessel, M.R.

benefit to the world." It does not say that it is expedient to afford greater encouragement to the production of literary works of lasting benefit to the world and to amend the law of copyright relating thereto, but that it is expedient to amend the law of copyright generally, merely adding the principal reason for doing so. There is therefore nothing in the preamble to cut down the enacting part even if the enacting part had not been clear. I see nothing in the Act to exclude a book which consists of pictures only, or to restrict the Act to books containing letterpress. If we can construe the Act so as to promote fair and honest dealing such a construction is to be preferred.

Several decisions have been cited which are not very consistent with each other. The view I take of *Bogue* v. *Houlston* (1) is that there was no copyright in the letterpress. The Plaintiffs' publication contained the old story of "*Reynard the Fox*," and other stories, to which it was not necessary to refer, as the Defendant had only copied that one and the illustrations to it. I do not think that the judgment turned on the fact of there being other stories in the volume. The two which are mentioned in the report were certainly old, and there is nothing to shew that there were any new ones. I think that the decision turned on the meaning of the word "book." The Vice-Chancellor says (2): "The plaintiff said that his publication was a book, and that his name was duly registered at *Stationers' Hall* as the proprietor of that book, and he referred to the provisions of 5 & 6 Vict. c. 45, as giving him a copyright in such book within the definition in that Act, 'every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published.' This definition does not extend to prints or designs separately published, but only to the prints and designs forming part of a book, and the book is not less a book because it contains prints or designs or other illustrations of the letterpress. This Act vested in the proprietor so registered the right to sue in respect of any invasion or infringement of the copyright of his book. It appears to me that a book must include every part of the book, it must include every print, design, or engraving, which forms part of the book as well as the letterpress therein, which is another

(1) 5 De G. & Sm. 267. (2) 5 De G. & Sm. 274.

part of it. Prints published separately do not appear to have been within that Act by that express definition." It had been contended before the Vice-Chancellor that there could only be copyright when there was letterpress, and I think that what he meant to say was that prints forming a book were within the Act, though prints published separately were not, and that if published together in a volume they formed a book whether there was letterpress or not.

The case which has done all the mischief is *Cobbett* v. *Woodward* (1). The late Master of the Rolls there says: "But at the last it always comes round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy." I think that this is not the law. I am not aware that the use to which a proprietor puts his book makes any difference in his rights. His copyright gives him the exclusive right of multiplying copies, and he may use them as he pleases. I think, therefore, that *Cobbett* v. *Woodward* will not bear legal examination.

There are two cases tending in the opposite direction to *Cobbett* v. *Woodward*, viz., *Hotten* v. *Arthur* (2) and *Grace* v. *Newman* (3). It is true that in *Hotten* v. *Arthur* there was considerable literary work in the ordinary sense of the term; the publication was more than a mere catalogue, still its primary object was that of an advertisement to promote the Plaintiff's trade. The weight of authority then is against the doctrine that there cannot be copyright in a book issued as an advertisement, and I cannot see any principle in support of that doctrine. There would be difficulty in protecting these designs as engravings under the Act relating to engravings, it is easier to protect them as parts of a book. The Defendants thought that the law allowed them to appropriate the results of other men's labours, and they call upon us for an indulgent construction of the Act in their favour. It is in my opinion the duty of the Court to construe Acts of Parliament with a view to the furtherance of justice.

(1) Law Rep. 14 Eq. 407, 414. (2) 1 H. & M. 603.
(3) Law Rep. 19 Eq. 623.

C. A. 1882 MAPLE & Co. v. JUNIOR ARMY AND NAVY STORES.

LINDLEY, L.J.:—

I am of the same opinion. The question is one of some importance. The Plaintiffs' work is original in this sense, that they employed artists to make original drawings from pieces of furniture and from these drawings engravings were made which the Plaintiffs made into a book with descriptions and prices. The primary object of the Plaintiffs was to advertise their goods. That the work was original in the sense I have mentioned is clearly proved; and originality, not skill or merit, is the test whether a work is the subject of copyright. I should have felt no difficulty in this case were it not for the decision in *Cobbett* v. *Woodward* (1). If that case were reconcilable with the other cases on the subject I should be slow to overrule it, but it appears to me difficult to reconcile it with other cases, especially *Bogue* v. *Houlston* (2).

[JESSEL, M.R.:—I have just examined the record in *Bogue* v. *Houlston*, and I find that the bill did not claim copyright in any letterpress, and did not state that there were any other stories than "*Reynard the Fox*" in the plaintiff's book.]

That case, then, is a decision that there may be copyright in a set of engravings forming part of a book, though there is none in the letterpress, and that governs this case, for copyright in the engravings could not be obtained by binding them up with something else in which there was no copyright. *Hotten* v. *Arthur* (3) does not apply so closely, for in that case there was original letterpress. In *Cobbett* v. *Woodward* Lord *Romilly* did not follow *Bogue* v. *Houlston* even as then understood, for it was admitted that part of the plaintiff's book consisted of original letterpress, and I cannot follow his reasoning founded on the book being an advertisement. We have to choose between the decisions, and in my opinion the true view of the Acts is that taken in *Bogue* v. *Houlston*, *Hotten* v. *Arthur*, and *Grace* v. *Newman* (4), that a collection of illustrations put together into a book as distinguished from engravings intended to be sold separately is within the *Copyright Act*. They certainly form a book so as to come within the words of the Act; and I see no reason why we should be astute to

(1) Law Rep. 14 Eq. 407.
(2) 5 De G. & Sm. 267.
(3) 1 H. & M. 603.
(4) Law Rep. 19 Eq. 623.

construe the Act so as to exclude them. The Defendants have made a use of the Plaintiffs' work which, as observed by Lord *Romilly* in *Cobbett* v. *Woodward* (1), would not be considered fair among fair traders, and we ought not to strain the Act to make such a proceeding legal.

Solicitors for Plaintiffs: *Lumley & Lumley.*
Solicitors for Defendants: *Lewin & Co.*

H. C. J.

In re SILVER VALLEY MINES.

Winding-up—Costs of Official Liquidator—Application for Leave to appeal—Rules of Court, 1875, *Order* LV.

On the 29th of July, 1881, a petition was presented to wind up a company. On the same day an order was made by *Bacon*, V.C., on an application by *A.* that his name should be taken off the register of shareholders and his money returned to him. This order was made in ignorance that a winding-up petition had been presented, and was drawn up as of the 24th of August, 1881. On the 26th of August a winding-up order was made by *Hall*, V.C. *A.* claimed as a creditor for the moneys ordered to be refunded to him, and his claim was allowed. The liquidator was advised he ought to obtain a decision on the question whether V.C. *Bacon's* order was right, he thereupon took out a summons to have the claim of *A.* to rank as a creditor disallowed. *Kay*, J., on the 24th of June, 1882, dismissed the summons as misconceived, since he had no jurisdiction to disturb V.C. *Bacon's* order, and refused to give the liquidator his costs out of the estate. The liquidator on the 29th of June took out a summons for leave to appeal against V.C. *Bacon's* order of the 24th of August, 1881, and *Kay*, J.'s order of the 24th of June, 1882. *Kay*, J., dismissed this summons with costs, refusing the liquidator his costs out of the estate. The liquidator applied to vary this order:—

Held, that an official liquidator is a person who as a general rule is entitled to his costs out of the estate, and that under Order LV. an appeal would lie.

But, *held*, that as the application of the 24th of June was a manifest mistake it was competent to the Judge below to refuse the liquidator his costs of it, and the Court of Appeal would not interfere with his decision.

A liquidator, though in some sense a trustee, is a paid agent bound to discharge his duties with reasonable care and skill, and may be deprived of costs for a mistake which would not be sufficient to disentitle an ordinary gratuitous trustee to costs.

Held, that a liquidator who applies for leave to appeal from an order is as

(1) Law Rep. 14 Eq. 407.

C. A.
1882
In re SILVER VALLEY MINES.

a general rule entitled to the costs of the application, but they will be refused if the appeal would be frivolous.

Held, that if the application of the 29th of June had only been for leave to appeal against the order of the 24th of June, 1882, the Court of Appeal would not have interfered as to the costs, but that an application for leave to appeal against the order of the 24th of August, 1881, was reasonable, and that as the including in the application liberty to appeal against the other order did not increase the costs, the liquidator must be allowed his costs of that application out of the estate.

Leave to appeal against the order of the 24th of August, 1881, so as to entitle the liquidator to costs in any event, was however refused on the ground of lapse of time.

The principles upon which applications by official liquidators for leave to appeal are to be dealt with, considered.

ON the 21st of July, 1881, several shareholders in the company gave notice of motion for the 29th to have their names removed from the register on the ground that they were induced to apply for shares on the faith of untrue and misleading statements in the prospectus and in consequence of the suppression from the prospectus of material facts, and to have the money which they had paid to the company refunded.

On the 29th of July, 1881, a shareholder's petition was presented to wind up the company. On the same day the motions came on to be heard before Vice-Chancellor *Bacon*, and orders were made removing the names of the parties moving from the register and ordering return of their money. Some of these orders were dated the 24th of August owing to some informalities in the evidence which made it necessary to post-date them. These orders were made in ignorance that a winding-up petition had been presented. On the 26th of August a winding-up order was made on the petition in the Court of Vice-Chancellor *Hall*.

Counsel having advised that it was a doubtful question, and one upon which the official liquidator ought to obtain a decision, whether Vice-Chancellor *Bacon's* orders, having been made after the commencement of the winding-up, were valid, the official liquidator took out a summons to strike out the claim of *Abel*, one of the persons whose names had thus been removed, to rank as a creditor. The summons was adjourned into Court, and Mr. Justice *Kay* on the 24th of June, 1882, dismissed it with costs, being of opinion that it was wholly misconceived, as the order of Vice-Chancellor

Bacon of the 24th of August, 1881, directing the company to repay *Abel* his money was, until reversed on appeal, conclusive as to his right to rank as a creditor. His Lordship refused to give the liquidator his costs out of the estate.

The liquidator on the 29th of June took out a summons asking that he might be at liberty to appeal from the order of Mr. Justice *Kay* of the 24th of June, 1882, and from Vice-Chancellor *Bacon's* order of the 24th of August, 1881, removing *Abel* from the register and ordering repayment of his money, and that the costs of and incident to the summons and order of the 24th of June, 1882, might be paid out of the assets of the company. The summons was heard by Mr. Justice *Kay* at Chambers on the 30th of June, and his Lordship refused it with costs, and, as it was stated, said that in all liquidations under his control he wished it to be distinctly understood that official liquidators must conduct litigation entirely at their own risk as to costs in the event of failure.

The liquidator now applied *ex parte* to vary the order of Mr. Justice *Kay* by giving him out of the estate his costs of the summonses of the 24th and 29th of June, and giving him leave to appeal from Vice-Chancellor's *Bacon's* order.

Hastings, Q.C., and *Beddall*, for the application:—

The liquidator is a trustee for the contributories and creditors and is entitled to costs out of the estate unless he has been guilty of misconduct. They are not costs in the discretion of the Judge, but are the subject of an appeal: *Turner* v. *Hancock* (1); *Farrow* v. *Austin* (2).

[JESSEL, M.R.:—There have been cases in which trustees have been deprived of their costs though they had not been guilty of anything which would ordinarily be called misconduct.]

We use "misconduct" as a general expression, it would be more accurate to say that a trustee cannot be deprived of costs without a case being made against him.

[JESSEL, M.R.:—It has never been decided, and I hope never will be, that a paid liquidator stands in precisely the same position with regard to costs as a gratuitous trustee.]

(1) 20 Ch. D. 303. (2) 18 Ch. D. 58.

C. A. 1882

In re Silver Valley Mines.

He is discharging the duties of a fiduciary position for the benefit of other parties, though he is paid a salary, and is one of the persons whose right to appeal for costs is saved by Order LV. Then it is almost a matter of course that a liquidator should be allowed his costs of an application for leave to appeal against an order when counsel advises that an appeal is proper. The principle laid down by Mr. Justice *Kay* that a liquidator is to conduct litigation at his own risk as to costs in case of failure is quite new. The Court no doubt exercises a discretion as to whether it will give leave, and if it does not give it then the liquidator must go on, if at all, at his own risk, but leave frequently is given in order that the liquidator may have his costs whether he fails or succeeds.

JESSEL, M.R.:—

This case, though it involves only a small amount of money, is one of considerable importance for the bearing it may have on the conduct of proceedings in the winding-up of other companies, and I propose therefore to consider the matter at some length.

There are in fact three applications. The first is for the costs of the liquidator relating to a summons heard before Mr. Justice *Kay* in a representative case, the application being that the claim of a shareholder who had taken shares from which he was entitled to be relieved to rank as a creditor against the estate might be disallowed. The second application is to be allowed the costs of a summons in chambers for leave to appeal against the order made by Mr. Justice *Kay* on the summons I have mentioned, and also against a prior order made on the 24th of August, 1881, by Vice-Chancellor *Bacon*. The third is for leave now to appeal from the order made by Vice-Chancellor *Bacon*.

As regards the costs the matter stands thus. On the 24th of August, 1881, Vice-Chancellor *Bacon* made orders taking the names of seven shareholders off the register, and directing the moneys which they had respectively paid to the company, to be repaid to them. Two days after, viz., on the 26th of August, an order was made for winding up the company on a petition presented on the 29th of July, and as by the provisions of the *Companies Act* the winding-up commences from the date of the presentation of the petition, the order of Vice-Chancellor *Bacon*

pronounced on the 24th of August was an order made after the commencement of the winding-up, though it was made before the actual order for winding-up. Under those circumstances it was alleged that, having regard to the *Companies Act*, 1862, sect. 153, and to the fact that the Vice-Chancellor *Bacon* when he made the order was ignorant of the fact of the presentation of the petition, that order ought not to have been made and could not be supported. I give no opinion upon that question beyond saying that it is a serious question, and one undoubtedly capable of being argued. Then the winding-up order having been made, and the claim of the seven shareholders to rank as creditors having been brought in and allowed by the Chief Clerk, the official liquidator took out a summons to disallow the claim of *Abel*, one of the seven, whose case was taken as a representative one. That summons was refused by Mr. Justice *Kay* on the ground that he had no jurisdiction. I have no doubt whatever that this was right, because the order of Vice-Chancellor *Bacon* had decided that *Abel* was a creditor, and so long as that order stood there was no possibility of rejecting his claim to rank as such. His Lordship, therefore, was clearly right in refusing the summons, but he refused also to give the costs of the liquidator out of the estate. Now was that right or not? In the first place it appears to me that the case is one which is the subject of appeal. I think, having regard to the words of Order LV., and the words of the Act, the official liquidator must be treated as a person who as a general rule is entitled to his costs of the liquidation properly incurred, and therefore he can appeal against the order. But we then come to the question what is the real position of the liquidator and how far we ought to interfere with the discretion of the Judge when it has been exercised in refusing costs. The Judge was of opinion, and I am not disposed to disagree with him, that the application made on the part of the liquidator was a blunder, he puts it in fact rather more strongly, for he says that in his opinion it was altogether improper and wrong. That being so, the Judge deprived him of his costs. Now it appears to me that the Judge had an undoubted discretion to deprive him of his costs even if he had only made a mistake, and *à fortiori* if he had made a blunder, which, as I understand it, is a stronger term than

C. A. 1882 *In re* SILVER VALLEY MINES. Jessel, M.R.

mistake, and *à fortiori* if the words "improper and wrong" applied by the Judge were deserved. It is no doubt settled that it requires a very strong case to deprive an ordinary gratuitous trustee of his costs. As a rule he can only be made to pay costs for misconduct, and he is only deprived of his costs for something which might properly be termed misconduct, though it sometimes is characterised by a milder term, such as neglect, or negligence, or carelessness. But there is no doubt that the Court of Chancery did occasionally deprive trustees of their costs for innocent mistakes. Some of the authorities are referred to in the last edition of Mr. *Lewin's* book (1), and there are many others to the same effect. My own view has been in favour of shewing indulgence to trustees in cases of innocent mistake, but undoubtedly there was jurisdiction to deprive them of costs for mistakes, and there might be a case of such a gross blunder which, though it might not amount to technical misconduct, might properly be visited with a deprivation of costs. But I by no means say that an official liquidator who (though no doubt in a sense he is a trustee) is a paid agent of the Court, is entitled to the same indulgence as an ordinary gratuitous trustee. I think that he is not. I think the cases in which he may properly be deprived of costs for a mistake, or a blunder, are more numerous than those in which any such order ought to be made as against a gratuitous trustee. That being so, we have to consider whether in the present case there has been such a miscarriage in the exercise of the discretion of the Judge that we ought to interfere? In my opinion, there has not. It is not for me to say whether I should or should not if sitting as a Judge of first instance have given the official liquidator his costs. It is quite sufficient to say that there having been a mistake, and the Judge having been of opinion that it was a very gross mistake, and he having a discretion for such a mistake to deprive the official liquidator of his costs, and having exercised it, this Court ought not to interfere with that discretion.

The next point that we have to consider is an entirely different one. An application was made to the Judge for leave to appeal. Now as I understand the practice, the official liquidator may, if

(1) Page 849.

he thinks fit, appeal without any leave at all, the first part of the 95th section of the *Companies Act*, 1862, not applying to proceedings in the winding-up; but if he appeals without leave, he does it, so to say, at his own risk, that is, if the appeal fails, he may lose his costs. The general practice of the Court of Appeal has been, as far as I am aware, not to decide whether the liquidator's costs of an appeal in which he fails are to be paid out of the estate or not, but to remit that to be decided by the Judge who has the charge of the liquidation. Occasionally, no doubt, the Court of Appeal has allowed the costs out of the estate without any such reference, but that has not been the general practice. The liquidator then when he applies for his costs to the Judge in the Court below is in this position, that he has appealed against that Judge's decision unsuccessfully, and no doubt that is not the most favourable position for a man to be in to apply for his costs. The liquidator therefore incurs considerable risk of losing his costs if he does not apply to the Judge beforehand to obtain his sanction to the appeal. There is another course which the liquidator sometimes takes, instead of applying to the Judge he goes to the parties interested and says, "Will you indemnify me against costs if I appeal?" Now it not being *primâ facie* an improper act on his part to apply for leave to appeal, I have no doubt that if he makes such an application, the Judge may take any one of three courses, he may refuse it with costs, or reserve the costs, or give him costs out of the estate. I have no doubt he can take any one of those courses, but it must be taken on sufficient grounds. If for instance, as was the case here, a Judge in refusing a summons by the liquidator stated in strong terms that the conduct of the liquidator in taking it out had been improper and wrong, of course it would be ridiculous to apply to the Judge for leave to appeal against the order refusing it. If therefore the liquidator's application to Mr. Justice *Kay* on the 30th of June had been confined simply to leave to appeal against his own order of the 24th of June, I should have said that the Judge was quite justified in refusing the application with costs. But the application was also for leave to appeal against the decision of Vice-Chancellor *Bacon*. Now, as I have already said, a very serious question arises on that, and if the application

C. A. 1882

In re Silver Valley Mines.

Jessel, M.R.

had been made in proper time, I should have thought it one which ought to be acceded to. But the order was made on the 24th of August, 1881, and the application was not made till the 30th of June, 1882, long after the time for appealing had expired. I am not prepared to say that the learned Judge was wrong in saying that this is not a case for giving leave so as to entitle the liquidator to costs out of the estate in all events, but that if the liquidator wishes to appeal otherwise than at his own risk he must apply to the parties interested, and see whether they choose to take the risk of appealing, or rather of applying for leave to extend the period for appealing after that long delay. I therefore am not disposed to interfere with the discretion of the learned Judge in refusing to give the liquidator leave to appeal from the decision of Vice-Chancellor *Bacon*. Of course, he still can appeal in perfect safety if he can get the persons interested to indemnify him as to the costs.

I then come to the only point on which I differ from Mr. Justice *Kay*. Ought he to have made the liquidator pay the costs of the application of the 29th of June, relating as it did to leave to appeal from the order of Vice-Chancellor *Bacon* as well as from his own order of the 24th of June? It was a proper case in which to ask for the sanction of the Court, and though such sanction was refused, the liquidator had done nothing wrong in asking it. The liquidator was not responsible for the order of Vice-Chancellor *Bacon*, and had obtained the advice of counsel that it was a proper case for an appeal. That being so, though the learned Judge in the exercise of his discretion refused the application, it does not appear to me that he ought also to have punished the liquidator by making him pay the costs so far as that part of the application was concerned, and still less do I think the rule ought to have been laid down in general terms that official liquidators must conduct litigation entirely at their own risk as to costs in the event of failure. It appears to me that there are cases in which the Court should give the leave, so that the liquidator may in any event get his costs out of the estate. I may state what my own practice was, not meaning to lay down binding rules of practice, but as illustrating what I consider to be the principles applicable to such cases. I considered that cases

where a liquidator came to me and asked for leave to appeal were divisible into three classes. The case might be one which I considered to involve a very important question, which would govern a great number of cases, and on which it was desirable to ascertain the views of the Court of Appeal for the purpose of further conducting the winding-up. In that case I always gave the leave, because whatever the result of the appeal might be, I got that instruction which was necessary in order to enable me to wind up the company according to law. There was a second class of cases, namely, cases where I myself felt a difficulty. Under the practice of the old Court of Chancery where a Judge of first instance felt a difficulty, he often directed an application to be made to the Lord Chancellor or the Court of Appeal in Chancery (which had the same original jurisdiction as the Lord Chancellor) for assistance, and the Appeal Court having original jurisdiction tried the case without a formal appeal. But after the passing of the *Judicature Act* that could not be done, because the Appeal Court decided, and it appears to me rightly decided, that they were merely an Appeal Court and had no original jurisdiction except in special cases with reference to an appeal, and therefore could not entertain an application at the instance of a Judge to decide a point, except on appeal. In such cases, therefore, after the passing of the *Judicature Act* I directed the official liquidator to appeal. The third class of cases was where I thought the case a clear one, and felt no doubt that the order I had made was right. In such cases, if the liquidator came to me for leave to appeal, I said, "I do not wish to prevent your appealing, but I am not going to give you the costs as a matter of right in case of failure." In those cases, therefore, if I gave him leave to appeal, I expressly put in the order a condition that the granting leave was not to entitle him as a matter of course to costs out of the estate. My reason was this, if the Judge makes an order which entitles a liquidator to costs in any event, the Court loses to a great extent its control over the costs. The liquidator may conduct the appeal in an unnecessarily expensive way, and the Court having authorized the appeal cannot exercise the same control over the amount expended as if it had reserved the right of dealing with the costs. Therefore as a general rule I did not in

C. A. 1882 — *In re* SILVER VALLEY MINES. — Jessel, M.R.

such cases give the liquidator absolute leave to appeal without reserving costs. Still I do not remember any case of an application to me by a liquidator for leave to appeal in which I did not give him the costs of that application out of the estate. Of course I should not do so in a frivolous case, but I do not remember a frivolous case having been brought before me, and as a general rule, no doubt, the costs of such an application ought to be paid out of the estate.

It seems to me, therefore, that the costs of the application for leave to appeal against the order of Vice-Chancellor *Bacon*, though the application was not granted, should have been provided for out of the estate, and as no additional costs were incurred by reason of joining with that application the application for leave to appeal from the order of Mr. Justice *Kay*, I think the costs of that summons should be paid out of the estate. The Appellant, however, has failed on the main part of his application, and I do not feel disposed to make any order as to the costs of the appeal.

BRETT, L.J.:—

The difficulties in this case appear to me to have arisen from an attempt to lay down rules of practice in abrupt terms. To lay down principles of law is a good thing, but it is a very dangerous thing to lay down inflexible rules of practice.

The first point is as to the costs of the application of the 24th of June, 1882. The official liquidator took an opinion as to the validity of Vice-Chancellor *Bacon's* order of the 24th of August, 1881, and was advised that there was good ground for questioning its validity. He did not, however, take advice as to the proper mode of proceeding to impeach its validity, but acted on his own view, and took out a summons to strike out the name of *Abel* from the list of creditors. It was found when this summons came on that it was in fact an appeal from Vice-Chancellor *Bacon* to Mr. Justice *Kay*. It was therefore dismissed with costs, and no one disputes that it was rightly so dismissed. Then the liquidator asks to have his costs out of the estate, and it is argued that the Court is bound to give them, because it is a fixed rule that a trustee shall have his costs unless he has been guilty of misconduct, *i.e.* has done some act which is morally wrong. There can

be no such rule. Though a liquidator has done nothing morally wrong, yet if he has done something which in the opinion of the Judge is the result of ignorance of the law or gross want of care, the Judge is not bound to allow the costs out of the estate so as to make the estate pay for the blunder of the liquidator. In my opinion Mr. Justice *Kay* was justified in saying that the application to him to disallow the claim of *Abel* was a gross blunder. He therefore was not bound to allow costs out of the estate, and we cannot interfere with his decision that they should not be allowed.

After this the liquidator took out a summons comprising an application for leave to appeal against the order which refused him his costs. It is not easy to ask a Judge to allow an appeal from his own decisions, but if an opinion of eminent counsel adverse to his decision were shewn him he probably in general would allow it. Here, however, the Judge thought that to make the application of the 24th of June last was a gross blunder, and I cannot see that he was wrong in refusing leave to appeal from the order of dismissal either as to costs or as to the merits. If the summons had had no other object than leave to appeal against the order of the 24th of June, 1882, I think that an order dismissing it with costs, and refusing to order the liquidator costs out of the estate, would have been perfectly right.

The summons, however, had a second object—leave to appeal against Vice-Chancellor *Bacon's* order of the 24th of August, 1881. It would seem not unreasonable to ask for leave to appeal against that order. The liquidator could appeal without leave, but it is reasonable that he should ask for leave. Mr. Justice *Kay* is stated to have laid down the general rule that in all liquidations under his control the liquidator must conduct litigation at his own risk in case of failure. I doubt whether Mr. Justice *Kay* meant to say what is attributed to him; but if he did, I think that his position cannot be supported. If he refused costs on that ground I think that he acted on a wrong general rule, and that appeal lies from his decision. I do not say that his decision might not have been supported if it had been put on the ground that an application for leave to appeal after such a lapse of time was unreasonable, but this ground does not appear to have been taken.

C. A.
1882
In re SILVER VALLEY MINES.

COTTON, L.J.:—

This is an appeal from two orders of Mr. Justice *Kay* refusing costs to a liquidator. The two stand in different positions. As to the first order, that of the 24th of June, 1882, consider the position of a liquidator. In my opinion he is a person having a *primâ facie* right to costs, but is not in the ordinary sense a trustee. He is a person appointed by the Court to do a certain class of things; he has some of the rights and some of the liabilities of a trustee, but is not in the position of an ordinary trustee. Being an agent employed to do business for a remuneration, he is bound to bring reasonable skill to its performance, and, though as a general rule he is entitled to his costs out of the estate, he may be deprived of them, not only on the grounds on which an ordinary trustee might be deprived of them, but on the ground that he has not exercised a reasonable amount of skill. He is not in my opinion entitled to costs which have been occasioned by his own want of reasonable skill. Here Mr. Justice *Kay* held that the liquidator in taking out the summons which was disposed of on the 24th of June, 1882, shewed a want of reasonable care and skill, since while the order of Vice-Chancellor *Bacon* remained undischarged it was impossible to say that *Abel* was not a creditor, and on that ground he decided that the liquidator ought not to have his costs. I see no reason to differ from this conclusion, and, therefore, though I think the case one where an appeal will lie, I do not think that it ought to be allowed as regards the refusal to give the costs of the summons of the 24th of June out of the estate.

The question as to the costs of the summons of the 29th of June is in a different position. If the note of counsel is an accurate representation of what Mr. Justice *Kay* said, he must be taken to have decided the case in accordance with the general rule which he is stated to have laid down, and that rule in my opinion is erroneous. I cannot agree with the view that a liquidator is always wrong in going to the Judge to ask whether he shall appeal. The Court of Appeal as a general rule does not decide whether a liquidator shall have his costs of an unsuccessful appeal out of the estate, but leaves the matter to the determination of the Judge who has the control over the winding-up. Looking at the first part of sect. 95 of the *Companies Act*, 1862, I think that an appli-

cation to the Judge for leave to appeal is proper. Of course I do not mean that a liquidator is to apply in every case of an adverse order; if an appeal would be frivolous the Judge would be right in refusing to the liquidator his costs of an application for leave to bring it, but it would in my opinion be quite wrong to lay down as a general rule that a liquidator is not to be at liberty to ask the Judge whether an appeal shall be brought at the cost of the estate. The Judge when the application is made may say, "You may appeal, but I will not decide now whether you shall have costs out of the estate if you are unsuccessful." On the other hand, he may properly say, "I look upon this as a case where there ought to be an appeal, and you shall have your costs in any event." There is a difficulty about taking this latter course, because the Judge thereby loses his control over the costs; but there is some control by law, for taxation puts a check on any wanton extravagance. Still I agree that a Judge ought to be very cautious as to deciding beforehand that the costs shall come out of the estate if the appeal fails.

Here the application was for leave to appeal against two orders. If it had been confined to the leave to appeal against the order of Mr. Justice *Kay*, I should agree that the costs ought not to be given out of the estate. But it includes an application for leave to appeal against Vice-Chancellor *Bacon's* order of the 24th of August, and though there has been a long delay, I think it was not unreasonable to ask for leave to appeal against that order. I think, therefore, that as the costs have not been increased by asking leave also to appeal from the other order, the costs of the application of the 29th of June ought to be given out of the estate.

Solicitors: *Beall & Co.*

H. C. J.

C. A.

1882

July 13.

Ex parte SALAMAN. *In re* TAYLOR.

Bankruptcy Petition—Act of Bankruptcy — Debtor's Summons—"Trader"—Discontinuance of Trade with Intention of resuming it—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 8.

11 QBD 248

If a debtor, who has been a trader, is not actually carrying on trade at the time when it is alleged by a petitioning creditor that he has done or omitted to do that, the doing or omission of which would be an act of bankruptcy only if it was done or omitted by a trader, it is a question of intention, to be decided on the evidence, whether the debtor has permanently ceased to trade, or has only temporarily discontinued his trade with the intention of resuming it. In the latter case he is still a trader within the meaning of the *Bankruptcy Act*.

The law on this point is still as it was laid down in *Ex parte Paterson* (1) and *Ex parte Cundy* (2).

Per JESSEL, M.R.:—If a petitioning creditor alleges that the debtor has committed an act of bankruptcy which can be committed only by a trader, the *onus* is on him to prove that the debtor was, within the meaning of the *Bankruptcy Act*, a trader at the time when the act was committed.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 23rd of May, 1882, a bankruptcy petition was presented by *J. Salaman & Co.* against *William Taylor*. The petition described *Taylor* as a coffee-house keeper, carrying on his business at Nos. 10 and 11, *Whitecross Street*. He had been engaged in that trade for sixteen years, though he had not occupied the same premises during the whole of the time. The act of bankruptcy alleged was that *Taylor*, being a trader, had for seven days after the service on him by the petitioners of a debtor's summons neglected to comply with the requirements of it. *Taylor* opposed the making of an adjudication on the ground (*inter alia*) that he was not a trader at the time when the debtor's summons was served on him. The petitioners were the debtor's landlords. On the 6th of April, 1882, they put in a distress for rent and removed the goods which they seized. The goods were sold on the 19th of April. In consequence of this seizure the debtor's business was stopped. The debtor's summons was served on him on the 22nd of April. Mr. *Emanuel*, the solicitor to the petitioning creditors,

(1) 1 Rose, 402. (2) 2 Rose, 357.

deposed that in May, 1882, long after the sale, he met *Taylor*, who then proposed to him that the petitioning creditors should stop an action of ejectment which they had commenced against him and should allow him to continue to carry on his business as before. Mr. *Emanuel* told him that any proposition which he had to make must be made through his solicitor. This evidence was not contradicted. The Registrar held that the debtor was not a trader at the time when the debtor's summons was served, and that consequently the alleged act of bankruptcy had not been committed, and on this ground he dismissed the petition.

The petitioning creditors appealed.

Winslow, Q.C., and *Herbert Reed*, for the Appellants:—

An act of bankruptcy was committed by the failure to comply with the debtor's summons within seven days after its service on the debtor. If he was not actually carrying on a trade at that time he was still a trader within the meaning of the bankrupt law. He had only temporarily ceased to carry on business; he had no intention of abandoning it altogether, on the contrary, it is clear that he intended to resume it. It is a question of intention: *Ex parte Paterson* (1); *Ex parte Cundy* (2). The law in this respect remains as it was when those cases were decided. The recent case of *Ex parte M'George* (3) does not affect this question. If it is once shewn that a debtor has been a trader, the *onus* is on him to shew that he has ceased to be a trader.

[JESSEL, M.R.:—Sect. 6 of the Act says "being a trader;" the *onus* is on the petitioning creditor to shew that the debtor is a trader.]

F. Cooper Willis, for the debtor:—

The *onus* is on the Appellants to shew that the debtor was a trader at the time when the alleged act of bankruptcy was committed. This *onus* has not been discharged.

JESSEL, M.R.:—

This is an appeal from the decision of Mr. Registrar *Pepys* that the Respondent was not a trader at the time when the debtor's

(1) 1 Rose, 402. (2) 2 Rose, 357. (3) 20 Ch. D. 697.

C. A. 1882 *Ex parte* SALAMAN. *In re* TAYLOR. Jessel, M.R.

summons was served on him by the Appellants. This is a mere question of fact—was he or was he not a trader at that time? The law relating to the subject is very old, and to shew what it is it is only necessary for me to read two sentences from two judgments of Lord *Eldon*. In *Ex parte Paterson* he said (1): "It is a question for a jury whether there was an entire cessation of trading, or merely an interruption with an intention of resuming it when an opportunity should offer." And in *Ex parte Cundy* he said (2): "His merely quitting the trade of a carpenter will not exempt him from the bankrupt laws, unless it were done with the object of absolutely abandoning it, and completely detaching from himself the character of a trader. It must, therefore, be sent to a jury to ascertain whether at the time this debt was contracted there was any intention of resuming his business." In the present case the Respondent had carried on business as a coffee-house keeper for sixteen years. At the beginning of April a distress for rent was put in by his landlord. On the 6th of April the goods which had been seized were removed, and on the 19th of April they were sold. There is positive evidence that in May he expressed an intention of resuming his business, and this is not denied. It does not follow that because a distress was put in, which compelled him to shut up his shop for a few days, all hope of resuming his business was abandoned. I am of opinion that when the summons was served on him, and the default committed by him, he was still a trader within the meaning of the *Bankruptcy Act*. The appeal must be allowed.

BRETT and COTTON, L.JJ., concurred.

Solicitors for Appellants: *Joel Emanuel & Co.*
Solicitors for Debtor: *Tippetts & Son.*

(1) 1 Rose, 405. (2) 2 Rose, 358.

W. L. C.

Ex parte COCKS. *In re* POOLE.

C. A.
1882
July 13, 14.

Trustee in Bankruptcy—Administration of Bankrupt's Property—Directions of Creditors—Application to Court for Directions—Power of Court to direct Trustee to disregard Resolution of Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 14, 20.

Under sect. 20 of the *Bankruptcy Act*, 1869, a trustee in bankruptcy is entitled to apply to the Court for directions in relation to any particular matter arising under the bankruptcy, as to which the creditors have already, by resolution at a general meeting, given him directions, and the Court has power for just cause shewn to direct the trustee to disregard the directions of the creditors and to act contrary to them. In such a case the Court ought not to order the resolution to be vacated or to declare it void, but simply to direct the trustee to disregard it.

Even though there be no fraud in the passing of a resolution giving the trustee directions as to the administration of the estate, yet, if the majority of the creditors have voted, not simply with the view of administering the estate in the best way for the benefit of all the creditors, but with the view of favouring the debtor or persons whom he is alleged to have fraudulently preferred, the Court ought to direct the trustee to disregard the resolution.

Sect. 20 is to be construed with reference to sect. 14.

Ex parte Emmanuel (1) explained.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

In November, 1879, four persons named *Poole*, who carried on in partnership the business of marble masons under the firm of *Henry Poole & Sons*, filed a liquidation petition. Their statement of affairs shewed that their debts amounted to £6479 and their assets to £9164. On the 16th of December, 1879, the creditors at their first meeting resolved on a liquidation by arrangement, and appointed a trustee. The trustee realized the assets, and paid one dividend of 2*s.* in the pound. He afterwards suspected that some payments which the debtors had shortly before the filing of their petition made to two members of their own family, and a payment which they had made to a Mr. *Holder*, had been made by way of fraudulent preference. He was advised that proceedings for the purpose of recovering the moneys thus paid away would probably be successful, and in the course of the year 1881 various

(1) 17 Ch. D. 35.

C. A. 1882 *Ex parte* Cocks. *In re* Poole.

witnesses were, at his instance, summoned, under sect. 96, for examination in the Court of Bankruptcy, with a view to the institution of such proceedings. The trustee also suspected that a business similar to that of the debtors, which was being carried on in the neighbourhood of their former place of business by one *Piercy*, who had been a clerk in their employment, was really being carried on by him under some collusive arrangement with them for their benefit. Witnesses were examined at the instance of the trustee on this question also. The trustee's cash account up to the 11th of October, 1881, shewed that he had realized assets to the amount of £3534 5*s.* 2*d.*, and that out of this he had paid a first dividend of 2*s.* in the pound, amounting to £1261 11*s.* 1*d.* After payment of rents and rates, and other expenses, law costs amounting to £442 7*s.* 11*d.*, and charges of the trustee amounting to £169 2*s.* 10*d.*, there remained in hand a balance of £525 8*s.* 4*d.*, but this was subject to some deductions. There was nothing more to be realized, except what might be recovered by the proceedings which the trustee contemplated taking. The result of the account was that the remaining assets would probably pay the creditors a dividend of about 6*d.* or 7*d.* in the pound.

On the 14th of November, 1881, a general meeting of the creditors was held. This meeting was summoned by the trustee in pursuance of a requisition of creditors under rule 305 of the *Bankruptcy Rules*, 1870. The following resolutions were passed: "The creditors, having heard the statement of the trustee, direct the trustee to take no further steps in the examination of witnesses or commence litigation, the creditors being of opinion that no good will result to the estate by further examination or litigation. The creditors further direct the trustee to distribute the estate left in hand without any delay, and to take the necessary steps to close the liquidation as speedily as possible. That the trustee within four weeks call a meeting of creditors to consider the close of the liquidation, the release of the trustee, and the discharge of the debtors." The creditors who voted in favour of these resolutions were twenty-nine in number, their debts amounting in the whole to £7155. Among the creditors who voted for the resolutions were the members of the debtor's family, who were alleged to have been fraudulently preferred, and *Holder*, they having respectively proved

debts of £10 10*s.* 6*d.*, £13 15*s.*, and £70. A number of creditors for very small sums, some of them only a few shillings, also voted in favour of the resolutions. There were two dissentient creditors, to one of whom a debt of £4960 was due, to the other a debt of £20. The trustee applied to the Court for directions in the matter. From an affidavit made by him in support of his application, it appeared that, after paying further costs and charges, there would remain out of the assets already realized a sum of only about £110 to be distributed as a second and final dividend, which would provide a dividend of only 2*d.* in the pound. The trustee deposed that, if the proceedings which had been advised by counsel were taken and should prove successful, he believed that he would be enabled to divide a considerable sum among the creditors. The Registrar made an order directing the trustee not to carry out the resolutions, and ordering that the resolutions should be vacated. He made no order as to costs, except that the costs of the trustee should be paid out of the debtors' estate. The Registrar was of opinion that the small creditors did not give their votes with a view of realizing anything, but that they were induced to vote by the debtors and their solicitor, for the sole purpose of favouring the debtors. Some of the creditors who approved the resolutions appealed.

Gerard Laing (*H. Matthews*, Q.C., with him), for the Appellants:—

The application of the trustee purports to be made under sect. 20 (1) of the Act, but, unless there was some fraud in the

(1) Sect. 14 provides that, "When an order has been made adjudging a debtor bankrupt, herein referred to as an order of adjudication, the property of the bankrupt shall become divisible amongst his creditors in proportion to the debts proved by them in the bankruptcy; and for the purpose of effecting such division, the Court shall, as soon as may be, summon a general meeting of his creditors, and the creditors assembled at such meeting shall and may do as follows (*inter alia*):

"(1.) They shall, by resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt, at such remuneration as they may from time to time determine, if any; or they may resolve to leave his appointment to the committee of inspection hereinafter mentioned.

"(4.) They may, by resolution, give directions as to the manner in which the property is to be administered by the trustee, and it shall be the duty of

C. A. 1882

Ex parte Cocks. *In re* Poole.

passing of the resolution, the Registrar had no power to interfere after the creditors had given directions to the trustee. If the resolution was *intra vires* the Registrar had no power afterwards to interfere: *Ex parte Emmanuel* (1). In that case Lord Justice *Brett* said (2): "If what they (the creditors) have done is within their authority, but it is, in the opinion of the Court, an erroneous exercise of their authority, I think the Court cannot interfere. But if they have exceeded their authority, in my opinion the Court can and ought to interfere."

[Jessel, M.R.:—That only means that the Court ought not to interfere, not that it has no power to do so.

Brett, L.J.:—"Erroneous" does not mean "dishonest."

Jessel, M.R.:—It is plain that the Lord Justice could not have meant what you suggest, for the very words of sect. 14 are, "for just cause."

Brett, L.J.:—I meant that the mere fact that there was a difference of opinion between the Court and the creditors would not be a sufficient ground for setting aside their resolution. I was not referring to the question of jurisdiction.

Jessel, M.R.:—There might be "just cause" for setting aside

---

the trustee to conform to such directions, unless the Court for some just cause otherwise orders."

Sect. 20 provides that, "The trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall be deemed to override any directions given by the committee of inspection; the trustee shall call a meeting of the committee of inspection once at least every three months, when they shall audit his accounts, and determine whether any or what dividend is to be paid; he may also call special meetings of the said committee as he thinks necessary.

"Subject to the provisions of this Act, and to such directions as aforesaid, the trustee shall exercise his own discretion in the management of the estate and its distribution amongst the creditors. The trustee may, from time to time, summon general meetings of the creditors for the purpose of ascertaining their wishes; he may also apply to the Court, in manner prescribed, for directions in relation to any particular matter arising under the bankruptcy."

(1) 17 Ch. D. 35.

(2) Ibid. 40.

a resolution without any fraud; something might have happened after the passing of the resolution which rendered it undesirable that it should be carried out. For instance, the creditors might direct the trustee to complete a contract for the sale of some of the bankrupt's property, and the purchaser might afterwards have become bankrupt.]

The trustee has an option given to him; he can either summon a meeting of the creditors and ask for their directions, or he can apply to the Court himself. If he has taken the first course, and the creditors have given him directions, in the absence of fraud the Court has no power to interfere. Here, however, the meeting was summoned on the requisition of some of the creditors. A direction given by the creditors as to the administration of the estate is *intra vires*.

[JESSEL, M.R.:—Sect. 20 must be read in connection with sect. 14.]

There is a great distinction between resolutions passed at the inception of the bankruptcy, and resolutions subsequently passed as to the administration of the estate. Sect. 14 relates to the former, sect. 20 to the latter. The dissentient creditors are amply protected by the power which the Court has over the granting of the discharge of the bankrupt. At any rate there is no power to order the resolutions to be vacated. They are not resolutions which require to be registered. In *Ex parte Baum* (1) the order was only to cancel the certificate of registration. No benefit can result from the proposed proceedings.

[JESSEL, M.R., referred to *Ex parte Cobb* (2).]

Sidney Woolf, and *F. M. Abrahams*, for the trustee, were not heard.

JESSEL, M.R.:—

This is a case of very great singularity, and I do not remember any case at all like it. It is alleged that the bankrupts assigned the goodwill of their business to a Mr. *Piercy*, who had been a clerk in their employment, with the view of resuming it again. It is said that the goodwill is an asset of the bankrupts to which

(1) 7 Ch. D. 719. (2) Law Rep. 8 Ch. 727.

C. A. 1882. *Ex parte* Cocks. *In re* Poole. Jessel, M.R.

their creditors are entitled. It is also said that some family creditors have been preferred by the bankrupts to the extent of £500 or thereabouts. The trustee in the bankruptcy desired to litigate these matters for the purpose of recovering assets for distribution among the creditors. A general meeting of the creditors was called, at the instance of some of the creditors, for the purpose of giving directions to the trustee, and a resolution was passed directing him to stay all further proceedings in relation to these matters, and to divide the assets which were in his hands. It is important to see what was the position of the assets then. According to the evidence of the trustee their value was sufficient to pay a dividend of 2*d.* in the pound to the creditors. According to the imperfect accounts which were before the meeting, there appeared to be sufficient to pay a dividend of between 6*d.* and 7*d.* in the pound, but it was stated that the amount would be subject to some deductions. It does not appear that anybody asked the trustee at the meeting what the amount of the deductions would be. On the larger debts the sum which would be yielded by such a dividend would be very small; on the smaller debts it would be something too ridiculous to mention. Still the majority of the creditors with the greatest ardour voted in favour of the resolution. Independently of what the Registrar has said about it, it strikes one at once that this could hardly be a *bonâ fide* proceeding. I can quite understand that creditors who had a substantial amount of assets to divide among them might say, We will not risk any further litigation; but we will divide what we have got, and not take the chance of losing it altogether. But, when there is nothing substantial for division, that cannot have been the motive for passing such a resolution. It could not have been done with a view to the better administration of the bankrupts' estate, but there must have been some collateral motive. The only motive which I can see must have been the desire to put a stop to the proceedings which the trustee had commenced. The Registrar has come to that conclusion, and I have no doubt that he is right. Therefore, in my opinion, the action of the creditors was not legitimate.

Then a question has been raised as to the jurisdiction of the Court. It is said that the Court has no power at all to interfere, but that the resolution of the creditors is binding on the trustee

and must be carried into effect, unless it is actually fraudulent. I do not mean to say that there was any actual fraud in the present case. But sect. 20 says, that the trustee shall have regard to any directions given by resolution of the creditors at any general meeting; that he may summon general meetings of the creditors for the purpose of ascertaining their wishes; and that he may also apply to the Court for directions in relation to any particular matter arising under the bankruptcy. Someone must have the supreme power of direction. It cannot mean that the Court is to be subordinate to the direction of the creditors, it must mean that the direction of the creditors is to be subordinate to the direction of the Court. I should have said that this was the meaning looking at the words of sect. 20 alone. But the question does not depend only on that section. Sect. 14 is *in pari materiâ*, and it says that the creditors "may, by resolution, give directions as to the manner in which the property is to be administered by the trustee, and it shall be the duty of the trustee to conform to such directions, unless the Court for some just cause otherwise orders." The meaning of that is plain beyond all controversy, and it is impossible to suppose that the very similar words used in sect. 20 with regard to a subsequent meeting of the creditors, were intended to have a different meaning from that of the words used in sect. 14 with regard to the first meeting in the bankruptcy. It is manifest that the true reading of sect. 20 is that which I should have given to it independently of sect. 14. It is for the Court to decide whether there is "just cause" for directing the trustee not to follow the directions of the creditors. In my opinion in the present case just cause has been shewn why the resolution of the creditors should not be carried out. The word "just" does not add much weight, though it may add a little. It means that some substantial reason must be shewn. In my opinion such a reason has been shewn in the present case, and the decision of the Registrar is right. I think it is our duty to dismiss the appeal with costs.

BRETT, L.J.:—

The trustee being of opinion that, if he went on with the proceedings which he had commenced, a considerable sum might be

C. A. 1882 *Ex parte* COCKS. *In re* POOLE. Brett, L.J.

recovered for the creditors, a resolution of a most trenchant description was, contrary to his wish, arrived at by the meeting. They directed him to take no further step in the proceedings, to distribute the assets which he had realized (*i.e.*, in fact to give a great many of the creditors nothing at all in the shape of dividend), and they also resolved that he should take the necessary steps to close the liquidation, and should call a meeting to consider the close of the liquidation, the release of the trustee, and the discharge of the debtors. The trustee does not propose that the Court should set aside this resolution; it cannot do so, for it is not a resolution which requires registration; but he asks the Court to direct him whether, under the circumstances, he should disobey or disregard it. If the Court has power to do so, no one can doubt that it ought to direct him to disregard the resolution. The question is whether the Court has power to give such a direction? It is argued that the Court has not the power. It is admitted, however, that, if there had been some kind of fraud in the passing of the resolution, the Court would have had this power, on the ground, I suppose, that the resolution would then be absolutely void. There may not have been in the present case that kind of fraud which makes the resolution absolutely void, but there was this impropriety, that it is impossible to say as to some of the creditors who voted in favour of the resolution that they were acting *bonâ fide* for the benefit of all the creditors. But, notwithstanding this, it is said that the trustee is bound to obey such a resolution, and that the Court has no power to direct him to disobey it. Sect. 20 seems to me to shew that this contention cannot be maintained. It says that the trustee is "to have regard to" the directions of the creditors, not that he is to obey them. This is a remarkable phrase, it is not so absolute as if it had said that the trustee should obey the creditors' directions. I do not mean to say that it would be a proper thing for the trustee, without coming to the Court for its direction, to act contrary to the resolution of the creditors. But, when you read further, the section says that, subject to the provisions of the Act and to such directions as aforesaid, the trustee shall exercise his own discretion in the management and distribution of the estate, and that he may summon a general meeting of the creditors for the purpose of ascertaining

their wishes; and that he may also apply to the Court for directions in relation to any particular matter arising under the bankruptcy. It does not say that as an alternative he may apply to the Court for directions, but that he may "also" apply to the Court. That is to say, having ascertained the wishes of the creditors, he may then apply to the Court for its direction, and if he may apply to the Court, the Court may make an order directing him to disregard the resolution of the creditors. I also entirely agree with the Master of the Rolls that sect. 20 may be interpreted by reference to the similar words of sect. 14. There you find that the Court would have power, notwithstanding a resolution of the creditors at their first meeting, for right or "just" cause to interfere by a direction to the trustee, and it seems to me that the words of sect. 20 must have the same meaning. If, therefore, there is just cause for directing the trustee not to act in accordance with the creditors' resolutions, I think the Court has power to give such a direction. Without, therefore, vacating the resolution of the creditors, I think that a direction ought to be given to the trustee that, notwithstanding the resolution which has been so improvidently passed, he should proceed with the examination of witnesses. It seems to me that the Registrar's order was in substance right.

COTTON, L.J.:—

The first question is whether the Court had power to make the order which the Registrar has made.

It was argued that sect. 20 gives an alternative power to the trustee, and that, if he has applied to a general meeting of the creditors for directions, he cannot afterwards apply to the Court. That, in my opinion, is not a correct view, I think that the power of applying to the Court for directions is superadded to the power of applying to the creditors. That question, however, does not really arise in the present case, because the meeting was called, not by the trustee, but by a requisition of some of the creditors. If, however, the meeting had been summoned by the trustee himself, he could still, in my opinion, have afterwards applied to the Court for its directions.

Had then the Court power to make the order which has been

C. A.
1882
Ex parte COCKS.
In re POOLE.
Cotton, L.J.

made? It is plain that under sect. 14 the Court has power to overrule and disregard a resolution of the first meeting of the creditors, and it would be strange if it had not the same power with regard to the resolution of a subsequent meeting. In the present case I am of opinion that it would be reasonable for the trustee to disregard the resolution. The Court must be considered as having the supreme direction of what is to be done in bankruptcy, and under sect. 14 it clearly has power to overrule the direction of the first meeting of the creditors, and to direct the trustee to disregard it. I am of opinion that it has a similar power under sect. 20. Then arises the question whether the Registrar has rightly exercised this power, and I think that he has. The exercise of the powers which are given by the Act to the majority of the creditors ought to be most carefully watched, for we cannot help seeing that attempts are often made to use these powers for purposes for which they were not given. As Lord Justice *James* said in *Ex parte Page* (1), "The Legislature has given great power to the majority, but it must be exercised *bonâ fide* in the interest of the creditors, and not from motives of kindness to the debtor. There must be a *bonâ fide* resolution of the creditors dealing as creditors." In other words the power must be exercised with a view to the administration of the estate in such a way as to provide the best possible dividend for all the creditors. In the present case it appears to me that the resolution was passed, not for that purpose, but for some indirect object. In my opinion there has been really no exercise of the power at all, I mean not such an exercise of it as can bind the dissentient minority. The Registrar has come to the conclusion that the direction was given to the trustee, not for the purpose of obtaining a dividend for the creditors, but for some collateral purpose, for the purpose either of screening those persons who are said to have been fraudulently preferred by the bankrupts, or of enabling the bankrupts to resume their business. We must look also at that which is tacked on to the resolution,—directions to the trustee to call a meeting to consider the close of the liquidation, and the discharge of the bankrupts. It is said that this latter part of the resolution would be ineffectual because the requisite statutory majority was not obtained. But,

(1) 2 Ch. D. 323, 324.

in considering what was the object of certain resolutions, you must look at the resolutions as they were proposed to the meeting, and not only to that part of them which can be made effectual. The Registrar has arrived at the conclusion that the resolutions were passed not for a legal purpose, not in the *bonâ fide* exercise of the power given to the creditors by the Act. He has arrived at that conclusion on reasonable grounds, and I do not dissent from it. It is not necessary for us to say that the resolutions are bad altogether; it is sufficient to say that enough appears to justify the Court in saying, and indeed to require it to say, that the resolutions are not binding on the trustee, but that he ought to act contrary to them. In my opinion the Registrar's order is right, and the appeal must be dismissed with costs.

Woolf asked that the costs of a transcript of a shorthand writer's notes of the depositions, and of the Registrar's judgment might be included.

JESSEL, M.R.:—

It is for the Taxing-Master to decide as to the costs of copies of the depositions. We only direct that the costs of the transcript of the Registrar's judgment be included in the costs of the trustee.

Solicitors for Appellants: *Lumley & Lumley.*
Solicitors for Trustee: *M. Abrahams & Co.*

W. L. C.

C. A.

1882
CHITTY, J.
March 2, 6.

C. A.
July 14.

In re PARKER.

Election for Parliament—Election Expenses—Payment of Canvassers by Sub-Agent—26 & 27 *Vict.* c. 29, *s.* 2 [*Revised Ed. Statutes, vol. xiv. p.* 555].

It is unlawful for any election agent or sub-agent, except the expense agent, to make payments on behalf of the candidate even for current disbursements, and such payments cannot be recovered from the candidate.

An election sub-agent, who was a solicitor, employed canvassers for the work of the election, and paid them out of his own moneys. The expense agent having disallowed these payments the sub-agent brought an action against the candidate in the district registry for the money expended. The candidate obtained the common order to tax the Plaintiff's account as a solicitor's bill of costs, and then obtained an order to stay further proceedings in the action pending the taxation. On the taxation the candidate objected to the payments as illegal under the 2nd section of the *Corrupt Practices Act*, 1863 (26 & 27 Vict. c. 29) :—

Held (affirming the decision of *Chitty*, J.), that the payments were illegal; that although the sub-agent had an implied authority to employ canvassers, he had no implied authority to pay them, and therefore he could not recover the amount expended from the candidate:

Held, also, that the candidate could take the objection of illegality on the taxation of the bill of costs.

Whether the order to stay proceedings in the action pending the taxation was regular, *quære*.

THIS was a summons to review the taxation of the bill of costs of Mr. *H. W. Parker*, a solicitor, carrying on business at *West Auckland*, in the county of *Durham*.

At the General Election of 1880, Colonel *Surtees*, who was a candidate for *South Durham*, appointed Mr. *W. Watson* his central agent. Messrs. *Trotter, Bruce, & Trotter* were appointed by Mr. *Watson* sub-agents for certain sub-districts, including *West Auckland*, and Messrs. *Trotter, Bruce, & Trotter* employed Mr. *Parker* to assist them in the work of the election in the *West Auckland* sub-district.

In this capacity Mr. *Parker* was engaged from the 10th of March till the 6th of April, 1880, in promoting the return of Colonel *Surtees*, and employed several persons as runners and canvassing agents, whom he paid for their services. After the election he sent in an account of his charges and disbursements

to Colonel *Surtees'* expense agent, who disallowed Mr. *Parker's* charges for payments to the runners and canvassing agents, and sent him a cheque for the balance. Mr. *Parker* returned the cheque and commenced an action against Colonel *Surtees* in the district registry to recover the whole amount of his bill of costs, namely, £113 8*s.* 9*d.*

A common order to tax Mr. *Parker's* bill of costs under the *Solicitors Act* was then obtained by Colonel *Surtees.*

The petition was in the usual form, containing an allegation that the bill contained many improper charges, and that the Petitioner submitted to pay what should appear to be due to the solicitor on the taxation of the bill: and the order contained the usual clause that the solicitor should be at liberty to charge all sums of money paid by him to or on account of the Petitioner.

When this order was made, an order was made in the district registry, on the application of Colonel *Surtees,* to stay all proceedings in the action against him till the result of the taxation was known.

The Taxing Master allowed the items in the bill for payments by Mr. *Parker* to the runners and canvassing agents, which had been disallowed by the expense agent; and Colonel *Surtees* took out a summons to review the taxation, which was adjourned into Court to be heard before Mr. Justice *Chitty.* The summons came on to be heard before Mr. Justice *Chitty* on the 2nd of March, 1882.

Ince, Q.C., and *A. T. Watson,* for the summons, contended that the payments in question which had been made by *Parker* ought not to be allowed, inasmuch as he had no direct authority to make them, and also that they had not been made through the expense agent as expressly required by the *Corrupt Practices Prevention Act,* 1863, s. 2 (1). They also referred to sects. 3 and 4 of the

(1) 26 & 27 Vict. c. 29, s. 2: "No payment (except in respect of the personal expenses of a candidate) and no advance, loan, or deposit shall be made by, or on behalf of, any candidate at an election, before, or during, or after such election, on account of or in respect of such election, otherwise than through an agent or agents whose name and address, or names and addresses, have been declared in writing to the returning officer, on or before the day of nomination, or through an agent or agents to be appointed in his or their place as herein

C. A. 1882

In re PARKER.

same Act; to the *Corrupt Practices Prevention Act*, 1854 (17 & 18 Vict. c. 102), and *Nurton* v. *Dickson* (1).

Macnaghten, Q.C., and *Whitaker*, for *Parker*, *contrà*, referred to the same statutes, and to *In re Osborne* (2).

CHITTY, J.:—

This is an application to review the certificate of the Taxing Master. The objections raised are with reference to certain items in the bill under the heads of "Payments to personation agent £1 1*s.*, *Booth's* clerk £1 10*s.*," and so on, including payments to runners and canvassers, payments for printing, and the hire of conveyances for canvassing and other purposes, including polling.

The questions raised depend upon the construction of the Act 26 & 27 Vict. c. 29, which is an amending and continuing Act. The facts, so far as it is necessary for me to state them, lie in a very small compass. Colonel *Surtees* was a candidate for *South Durham* at the election of 1880, and he appointed, as his central agents, Messrs. *Watson*, and under Messrs. *Watson* there were employed Messrs. *Trotter*, *Bruce*, *& Trotter* for certain districts, one of those districts being *West Auckland*. It appears, from the evidence, that Mr. *Parker*, who is a solicitor, was also employed—and employed upon the authority of Messrs. *Watson*, as I hold upon the evidence before me, but by the immediate authority of Messrs. *Trotter*, *Bruce*, *& Trotter*—to act as what has been called a sub-agent for a small portion of those districts, namely, the sub-district of *West Auckland*. The first point raised is with reference to his authority. I am not satisfied that that question was in any way substantially mooted before the Taxing Master, but it has been discussed before me, and therefore I will state the opinion I have formed upon it. Undoubtedly Mr. *Parker* was, as is shewn by the order to tax under which this taxation has taken place, employed as solicitor to assist the Petitioner's return to

---

provided; and any person making any such payment, advance, loan, or deposit otherwise than through such agent or agents shall be guilty of a misdemeanor, or, in Scotland, of an offence punishable with fine and imprisonment."

(1) 5 H. & N. 637.

(2) 25 Beav. 353.

Parliament as member for *South Durham*, and to act as an agent in the district of *West Auckland*. The conclusion I have arrived at on the evidence is that the matter was to be left in his hands without control, and that it was within the scope of the authority conferred on him to hire to a reasonable extent runners, canvassing agents, and, no doubt, personation agents also. So far, I am in favour of Mr. *Parker*.

The next question is, whether there was any authority for Mr. *Parker* to make the payments now in dispute. That is a different point, and one which cannot be decided without reference to the Acts of Parliament, because there is admittedly no express authority given to Mr. *Parker* to make the payments; and the question is whether such an authority could be implied. This gives rise to the question of the construction of the Act, to which I have referred. It is an Act to amend and continue the former Act of 1854. The material section is the 2nd, and I will give my opinion on the effect of that section without reference to any prior legislation. When the prior legislation on the subject is referred to, it, to my mind, makes it still more clear that the conclusion I have arrived at, on the construction of that section, is the right one.

The 2nd section says that, "No payment, except"—and the exception is of considerable importance—"in respect of the personal expenses of a candidate, and no advance, loan, or deposit shall be made by or on behalf of any candidate at an election, before or during or after such election, on account of or in respect of such election, otherwise than through an agent or agents" duly authorized in manner therein mentioned. Then the section proceeds thus: "And any person making any such payment, advance, loan, or deposit, otherwise than through such agent or agents, shall be guilty of a misdemeanor." Then the 3rd section requires that "all persons who have any bills, charges, or claims upon any candidate, for or in respect of any election, shall send in such bills, charges, or claims within one month from the day of the declaration of the election to such agent or agents as aforesaid, otherwise such persons shall be barred of their right to recover such claims and every or any part thereof."

Then the 4th section requires that "a detailed statement of

C. A. 1882 *In re* PARKER. Chitty, J.

all election expenses incurred by or on behalf of any candidate, including such excepted payments as aforesaid, shall, within two months after the election, . . . be made out and signed by the agent, or, if there be more than one, by every agent who has paid the same."

Now, on the question of the construction of the 2nd section, I must say I cannot entertain any doubt whatever.

The enactment is express. To put it shortly, no payment on behalf of any candidate is to be made otherwise than through the expense-agent. So that it is a clear and express enactment, and Mr. *Parker* admits, by the mode in which he has framed his account, that he has made payments on behalf of the candidate, and therefore that these payments have been made directly by him and in violation of the express terms of the Act of Parliament. I do not consider that there is really any fair ground for saying that such payments as these can be allowed.

It has been said the practice has been otherwise, but the Court can have no regard to that. It has been said also that it will be impossible to carry on elections if I come to the conclusion that these payments should not be allowed. But if so that will not be my doing, it will be the result of what the Legislature has by this Act expressly declared. As I have said, Mr. *Parker* admits he has made these payments on behalf of the candidate, and that these payments have not been made through the expense-agent. The result is, to my mind, quite plain: these payments cannot be allowed.

Another point was argued with considerable ability by Mr. *Macnaghten*, with a view, if he could, to reduce the matter to an absurdity. If the construction which I have put on the Act of Parliament is the right one, it is said that no sub-agent, no person employed on behalf of the candidate, will be able to pay even for a telegram, a letter, or a cab. Well, if that is the law, he cannot do it; but I may state my opinion that such payments, if made by a sub-agent, or other person employed, are payments made in respect of his own personal expenses. This case has been put: Suppose, it is said, some agent is employed on the terms of receiving £50 for his services and expenses out of pocket; I think it would be very reasonably contended that payments

made by him out of pocket in respect of cabs from one polling-station to another, or in respect of the postage of letters, were not payments made on behalf of the candidate, but payments made in respect of his own personal expenses. That payments such as these could not be made without violating the Act of Parliament, cannot be fairly contended; because the Act does not require that there should be a single agent. In the case of a county election, or any other election, there may be as many expense-agents appointed as may be found necessary for the proper working of the election; and in regard to payments such as those now in question, the sub-agent, if he has authority to employ personation agents, booth clerks, and so on, may always give them an order on the expense-agent. In a case like this of the *South Durham* election, money may be lodged, say in one of the banks of the district, and it is not necessary that the payment should be made by the expense-agent's own hands personally. He may employ a clerk to go down, and if the vouchers are produced and he is satisfied, the actual money-payment can be made by his drawing on the money lodged in the bank; so that all payments made on account of the election would actually pass through the expense-agent.

The construction which has been suggested, that the expense-agent is merely the ultimate paymaster, I do not think is the true one; but if it were, it would not help Mr. *Parker*, because if I were to accede to his application there would be an order of the Court the effect of which would be that these payments would have been made by Mr. *Parker* on behalf of the candidate and they would never have passed through the expense-agent as required by the Act.

Then the previous legislation was referred to, but I do not propose to go through it. The Act of 1863, 26 & 27 Vict. c. 29, is an amending Act. It repealed various sections of the Act of 1854, which is not nearly so stringent in regard to the payment of election expenses as the Act of 1863.

It was truly said that the Act of 1863 did not by way of recital shew whether it was intended by the new enactments, which were substituted for the old, to make the law more stringent than

C. A. 1882 *In re* PARKER. Chitty, J.

it was before; but, from a cursory comparison of the sections of the Act that are repealed with the 2nd and 3rd compendious sections of the Act of 1863, it is quite clear that the intention of the legislation was to make the law as to the payment of election expenses much more stringent than it had been.

That disposes of the case with the exception of one point. It was argued by Mr. *Macnaghten* that it was too late now for Colonel *Surtees* to raise the points. An action was brought on the bill, and the common order to tax was obtained, not in the action, but by an arrangement by Colonel *Surtees*, and it is said that by reason of something in that order Colonel *Surtees* is now precluded from raising the objection. I do not accede to that argument. The allegation on the face of the order is that the bill contains many improper charges. That allegation, in my opinion, covers charges which are unlawful, which it is unlawful, according to the view I take of the statute, for the candidate to pay, and I therefore think the points are sufficiently raised by that allegation.

Then it is said that the solicitor is, according to the terms of the order, to be at liberty to charge all sums of money paid by him for or on account of the Petitioner. That only means payments made by him by the authority of the Petitioner. I hold there was no authority to make the payments, not only on the ground that there is no express authority, but that it would have been in the teeth of the Act of Parliament to have given such an authority. I read these words in the order, that the solicitor is to be at liberty to charge all sums of money paid by him to or on account of the Petitioner to mean payments which have been authorized, and which can be lawfully made. It seem to me, therefore, that it is not too late for Colonel *Surtees* to raise, as he has done, the present objections. The certificate must go back to the Taxing Master, with directions to disallow these items from the 6th of April, and the applicant must have the costs of this application.

G. I. F. C.

C. A. From this decision Mr. *Parker* appealed.

The appeal was heard on the 14th of July, 1882.

Macnaghten, Q.C., and *Whitaker*, for the Appellant:—

The Respondent cannot take the objection as to the illegality of the payments before the Taxing Master. The defence of illegality ought to have been specially pleaded in the action, which was not done; but the bill was at once referred for taxation and the action stayed. This proceeding was entirely irregular.

The claim of the Appellant is perfectly legal. The construction of the 2nd section of 26 Vict. c. 29, contended for by Colonel *Surtees* is unreasonable. An election cannot be conducted without the agents and sub-agents paying out of their own pockets the current expenses.

The employment of canvassers is usual and legal, and is within the implied authority of all election agents, and if they have authority to employ they have authority to pay them. Therefore Colonel *Surtees* is liable for the payments. The section in question does not refer to current disbursements by the agents. They were not made "on behalf of" the candidates. The section refers to payments for which the candidate is primarily liable, and which some one else makes at his request. Such current disbursements are not intended to be paid by the expense-agent: *Nurton* v. *Dickson* (1).

Parker made himself liable to the canvassers. They were employed on "his own behalf," and he was liable for their payment. They could not have recovered their wages from the candidate, but they were employed and paid by *Parker* under an implied contract by the candidate, that he would repay him all his current disbursements in the ordinary course of his agency. Such payment is, in fact, part of his remuneration for his services as agent.

Ince, Q.C., and *A. T. Watson*, for Colonel *Surtees*, were not called on.

JESSEL, M.R.:—

In this case the facts are of no great complexity. At the last election for Parliament Colonel *Surtees* was a candidate for *South*

(1) 5 H. & N. 637.

C. A. 1882 *In re* PARKER. Jessel, M.R.

Durham; the Appellant, Mr. *Parker*, was one of his sub-agents or district agents, and as his sub-agent had the ordinary right to pledge the credit of Colonel *Surtees* for money expended in the performance of his sub-agency. Mr. *Parker* employed canvassers and paid them out of his own pocket. He brought an action against Colonel *Surtees* for his disbursements in the district registry, and after the action was brought Colonel *Surtees* obtained the common order to tax his bill, and then obtained an order in the action to stay proceedings in the action until the taxation was completed. That order has not been appealed from and must be taken on this appeal to be a good and binding order. Then Mr. *Parker* brought in his bill of fees and disbursements in which he claims all moneys paid out of his own pocket as the agent of Colonel *Surtees*. If he is allowed these payments at all it must be on the ground that they were payments made on behalf of Colonel *Surtees*, which Colonel *Surtees* was liable to pay.

The first point raised on behalf of the Appellant was that by reason of the action having been brought in the District Registry, and having been stayed at the instance of Colonel *Surtees*, it is not open to Colonel *Surtees* to contend in the taxation proceedings that the disbursements in question were not made on his behalf, and that he was not liable to pay them by reason of their illegality under the Act of 1863. I am at a loss to understand this objection. The matter comes before us on the application by Colonel *Surtees* to tax his solicitor's bill; the action is not before us in any way. We have nothing to do with it. Whether the order to stay proceedings was right or wrong does not concern us on the present appeal: we have only to consider on this order to tax the propriety of allowing or disallowing certain items. It is admitted and cannot be denied that in his bill of costs a solicitor may make charges for ordinary payments which he has made on behalf of his client, and the question we have to decide is, whether the charges complained of in the present case were properly made, exactly as if no action at all had been brought. Therefore this objection is not sustainable.

With respect to the second and principal question, it is admitted that there was no express authority from Colonel *Surtees* to make

these payments, but it is alleged that there was an implied authority. Was there any such implied authority to pledge his principal's credit for these payments? The answer is that even assuming that in the absence of the Act of 1863 authority might have been implied, the Act clearly and expressly provides that no payments can be made on behalf of a candidate except through his expense-agent, and these payments were not made through the expense-agent. The result is that if these payments by *Parker* were made on behalf of Colonel *Surtees* they were illegal, and therefore you cannot imply any authority from him to make them. And if they were not made on behalf of Colonel *Surtees* they cannot be recovered from him by his agent. In my opinion the true view is that these payments were not recoverable from Colonel *Surtees*, because you cannot imply an authority to do an illegal act.

We were much pressed by arguments as to the inconvenience of construing the Act so strictly, and by the alleged impossibility of conducting an election if no moneys for legitimate expenses could be disbursed by a sub-agent. I am not convinced of the impossibility of so conducting an election, but however inconvenient the result may be it is not for the Court to say that the Act of Parliament does not mean what it clearly and distinctly says. We have nothing to do with the inconvenience.

Then it is contended that the result of a literal construction of the statute is so absurd that this could not have been the intention of the Legislature, and therefore we ought not to read it in this way. But we are not told how we ought to read it, and for my part I can see no other way of reading it.

The only remaining point was remarkable for its ingenuity. It was said that these payments were made by *Parker* on his own behalf, and that, after the payments had been made, then for the first time *Parker* had the right to recover the amount from Colonel *Surtees* on the principle of fair remuneration for the performance of his duties as agent. There might, no doubt, be such a bargain by express contract, but that would be a special agreement which must be made out by expressed terms and cannot be implied from the mere fact of the existence of an agency, which is the only case that was before the Court. There is no founda-

C. A. 1882 *In re* PARKER.

tion whatever for the contention of the Appellant, and the appeal must be dismissed with costs.

BRETT, L.J.:—

I am of the same opinion. An action was brought by *Parker* against Colonel *Surtees*, who had been a candidate for the Southern Division of *Durham*, to recover certain moneys paid by him on behalf of Colonel *Surtees*. This could only be sustained by shewing that there was a contract expressed or implied that he would repay them. Then Colonel *Surtees* obtained an order to tax *Parker's* bill, and also an order to stay proceedings in the action. Whether the order to stay proceedings was right I express no opinion; but there has been no appeal from it, and it must be taken to be good.

If the objection had been that Colonel *Surtees* did expressly order and authorize *Parker* to pay money on his behalf, but that such payment was illegal, and therefore that *Parker's* claim to be repaid could not be allowed, I should have doubted if the question could be tried by the Taxing Master. But here the question is, whether they were payments which *Parker* was authorized to make, and it was admitted that the question of authority was one which it was open to the Taxing Master to decide.

Therefore the question is whether there was evidence before the Master that the payments were so made as to enable *Parker* to charge them against Colonel *Surtees*. Now it is admitted that he had no express authority from Colonel *Surtees* to pay these canvassers and runners, but only that he had a general authority to employ such persons for the purposes of the election. It appears Colonel *Surtees* appointed Mr. *Watson* as his agent, and Mr. *Watson* employed *Trotter, Bruce, & Trotter*, and they employed *Parker*. So that *Parker* must be considered the agent of Colonel *Surtees* for the purpose of carrying on a certain part of the election. By the custom of this kind of agency he employed canvassers. He was authorized to act in the ordinary way of election agents, and it was their ordinary custom to employ canvassers. He had therefore authority to employ canvassers, and if he employed them there was a privity between Colonel *Surtees* and them, and if he had not paid them I think Colonel *Surtees* would have

been bound to pay them. But the question is whether *Parker* had himself authority to pay them. I think he had not. It is not contended that he had express authority. Had he implied authority? In an ordinary case, no doubt, if a man has authority to employ people he is also authorized to pay them. But the Act of 1863, sect. 2, says expressly that no payment shall be made except through one particular agent, that is the expense-agent, and that anyone who does make such payment except through such agent shall be guilty of a misdemeanor. When the Act says that no payment shall be made except through one particular agent, and that if any other person makes such a payment he shall be guilty of a misdemeanor, can the Court assume that Colonel *Surtees* employed *Parker* to do that which was directly contrary to the Act, and would expose *Parker* to the penalties of a misdemeanor? It appears to me that the Court cannot imply such an authority. *Parker* ought to have employed the canvassers and to have sent them to the agent who was appointed by the candidate to pay the expenses, or else to Colonel *Surtees*. At all events *Parker* had no authority to pay them himself. It was suggested that there was a special contract between Colonel *Surtees* and *Parker*, that Colonel *Surtees* in effect said to him, "You are to employ the canvassers on your own account, and not on mine, and I undertake to repay you what you pay them." And so it said that *Parker* paid the canvassers not on Colonel *Surtees*' account but on his own. That is an ingenious suggestion. Even if such a contract had been made in express terms, I doubt whether it would not have been a mere evasion of the Act, and whether the Court could not have held that the payments made by *Parker* were really disbursements on behalf of Colonel *Surtees*. However that may be, the question here is whether such a special contract can be implied; for it is not pretended that there was any express contract to that effect; and it is clear to me that no such contract can be implied. Therefore in no sense could *Parker* recover these disbursements in an action; and it follows that the charges ought not to be allowed in taxation. I decide the case on the single ground that though *Parker* had authority to employ the canvassers he had no authority to pay them.

C. A. 1882 *In re* PARKER.

COTTON, L.J.:—

I am of the same opinion. The claim made by *Parker* is for sums paid to canvassers in the election, and of course on the ground that they were disbursements made by the authority of Colonel *Surtees*. His bill of costs is in respect of his services in the election, and it is not alleged that there was any express authority from Colonel *Surtees* to make these payments. The only authority was that which was implied from the fact that *Parker* was appointed one of his local agents, and that he was to do all that is ordinarily done by local agents. But that means all that can be legally done, as well as ordinarily done. If any Act of Parliament makes anything that is ordinarily done illegal the ordinary authority will not give the agent authority to do it. Therefore, the only question we have to consider is whether the Act in this case forbids what *Parker* has done. In my opinion it does forbid it. Therefore there was no implied authority to make these payments, and it is admitted that there was no express authority.

It has been argued that these payments were not made on behalf of the candidate within the meaning of the Act. But I am of opinion that if made by the authority of the candidate they were made on his behalf. Every payment that is made by his authority is made on his behalf, and by the express words of the section no such payment can lawfully be made by any agent except the agent specially appointed for that purpose.

Then it was suggested that there was a contract that *Parker* should employ these canvassers on his own authority, and that he should be repaid by the candidate the expenses which he might be put to on this account. But there is no evidence of any such contract; and I doubt whether such a contract if made would be a legal contract. In my opinion these payments were made not on behalf of *Parker*, but of the candidate.

The only other point is whether the defence is open to Colonel *Surtees* on the taxation. The only question now before us is whether these payments charged in the bill of costs were made by the authority of Colonel *Surtees*. We cannot consider the proceedings in the action. We are only dealing with the common order to tax. Whether the order to stay proceedings in the

action is one which *Parker* could have resisted is a different question. He has not resisted it; and we must take it to be binding. The appeal must be dismissed with costs.

C. A. 1882 *In re* PARKER.

Solicitors for Appellant: *Hatton & Westcott.*
Solicitors for Respondent: *Crowdy, Son, & Tarry.*

M. W.

SMITH *v.* DAY.

C. A. 1882 *July* 17.

[1879 S. 482.]

Interlocutory Injunction—Undertaking as to Damages.

An injunction to restrain the Defendant from building so as to prevent access of light and air to the Plaintiff's windows was granted *ex parte* on the 4th of November, 1879, and on the 27th of November was continued until the trial or further order, the Plaintiff giving the usual undertaking as to damages. On the 18th of February, 1880, the Court of Appeal discharged the order. On the 11th of November, 1880, a perpetual injunction as to access of air was granted; but on the 21st of June, 1881, the Court of Appeal dismissed the action with costs. On the 16th of February, 1882, the Defendant gave notice of motion for an inquiry as to damages which was refused by *Bacon*, V.C. The only damage alleged was that the Defendant had agreed to let part of the property with the new buildings to a tenant, and was prevented from carrying this out by the injunction preventing his building. It was not proved, however, that there was any binding agreement to take a lease, nor did it appear that the injunction interfered with the erection of the buildings to such an extent as would have entitled the intended tenant to throw up the agreement if binding:—

Held, by the Court of Appeal, that an inquiry as to damages ought not to be granted.

Whether where an interlocutory injunction has been wrongly granted, owing to a mistake of law by the Judge, without any misrepresentation, suppression, or other default on the part of the Plaintiff, an inquiry as to damages can be directed under the undertaking, *quære*. *Jessel*, M.R., and *Cotton*, L.J., differed, and *Brett*, L.J., gave no opinion.

The Court is not bound to grant an inquiry as to damages whenever the Defendant has sustained some damage by the granting the injunction; but it has a discretion, and may refuse any inquiry if the damage restrained is trivial or remote, or if there has been great delay in making the application.

The question considered at what time the application for an inquiry as to damages ought to be made:—

Held, that, even if there had been a binding agreement by the proposed tenant to take a lease, and the injunction had so interfered with the building

C. A
1882
SMITH
v.
DAY.

as to entitle the tenant to be off the bargain, damages ought not to be granted in respect of it, for that damages must be confined to the immediate natural consequences of the injunction, under the circumstances which were within the knowledge of the party obtaining the injunction.

THIS was an action for an injunction to restrain the Defendant from continuing to erect a building so as to interfere with the access of light and air to the Plaintiff's windows.

The writ was issued on the 4th of November, 1879, and on the same day an interim injunction was obtained, "The Plaintiffs, by their counsel, undertaking to abide by any order the Court may make as to damages in case the Court shall hereafter be of opinion that the Defendant shall have sustained any by reason of this order which the Plaintiffs ought to pay."

On the 27th of November, 1879, notice of motion having been served, an injunction was granted until the trial or further order, the order containing a similar undertaking as to damages.

On the 18th of February, 1880, the Court of Appeal discharged the order for injunction on the Defendant undertaking, if so directed at the trial, to pull down any buildings erected or to be erected by him (1).

The action was transferred to Vice-Chancellor *Bacon*, and was tried by Mr. Justice *Fry*, who by judgment, dated the 11th of November, 1880, granted a perpetual injunction restraining the Defendant from building so as to interfere with the access of air to the Plaintiffs' premises, not mentioning light.

The Defendant appealed, and on the 21st of June, 1881, the Court of Appeal dismissed the action with costs.

On the 16th of February, 1882, the Defendant gave notice of motion for the 24th that an inquiry might be directed what damages the Defendant had sustained by the orders for injunction of the 4th and 27th of November, 1879, and that the Plaintiffs might be ordered to pay the amount of such damages when ascertained.

In support of his motion the Defendant filed an affidavit in which he deposed that at the time when the injunction was granted he was erecting some buildings on his land in pursuance of a contract which he had entered into with the *British Cab*

(1) 13 Ch. D. 651.

Company, Limited. That the buildings in question were to be used as stabling, utensil shed, &c., and the company had agreed to take them (the stabling comprising twenty-five stalls) at £200 a year for seven years, and to take additional stalls at a further rental. That the company took possession of part of the property about the 26th of October, 1879, and continued in possession until the 14th of November, 1879. That in consequence of the injunction the arrangement could not be carried out. That the portion agreed to be let to the *Cab Company* was only a small part of the property, and that the arrangement was a very beneficial one to the Defendant.

On investigation it did not appear that there was any binding agreement to take a lease, though there was a negotiation which had proceeded so far that the draft of a lease had been approved by both parties. The Court, moreover, considered it not to be shewn that the injunction interfered with the buildings to such an extent as would have entitled the *Cab Company* to recede from the agreement if there had been any binding agreement to take a lease.

On the 17th of March, 1882, Vice-Chancellor *Bacon* refused the application. The Defendant appealed.

Hemming, Q.C., and *Maidlow*, for the Appellant:—

This case is one for an inquiry as to damages.

[JESSEL, M.R.:—I doubt whether you are entitled to it. This is not like an action for damages. A plaintiff who gives an undertaking pays damages if he has suppressed material facts, or otherwise obtained the injunction improperly; but I do not think that the Defendant is entitled to damages because the Judge has made a mistake.]

Newby v. *Harrison* (1) is almost identical with the present case, and was a case of mistake by the Judge below, not of misconduct on the part of the Plaintiff.

[JESSEL, M.R.:—The lapse of time there was very different.]

In *Newcomen* v. *Coulson* (2) an inquiry as to damages was directed eleven months after the plaintiff had discontinued his

(1) 3 D. F. & J. 287. (2) 7 Ch. D. 764.

C. A. 1882 SMITH v. DAY.

action; it was intimated that a delay of a year would not be a bar to the application. Here a man who has done no wrong is delayed for months in proceeding with his building, and must be taken to have suffered damage. He loses the chance of letting his property for that period. The Court has jurisdiction to give damages, and we submit that this is a proper case for exercising it.

Millar, Q.C., and *Vernon Smith*, *contrà*, were not called upon.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon* refusing an inquiry as to damages sustained by the Defendant by reason of an injunction originally granted *ex parte*, but afterwards continued on notice, restraining the Defendant from building so as to obstruct the access of light and air to certain windows. The Plaintiffs on obtaining it gave the usual undertaking as to damages. [His Lordship read the undertaking.]

I will first say a few words as to the history and meaning of this kind of undertaking. It was invented by Lord Justice *Knight-Bruce* when Vice-Chancellor, and was originally inserted only in *ex parte* orders for injunctions. Its object was, so to say, to protect the Court as well as the Defendant from improper applications for injunctions. If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the Plaintiff but to compensate the Defendant. By degrees the practice was extended to all cases of interlocutory injunction. The reason for this extension was, that though when the application was disposed of upon notice, there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of the time allowed, it was often difficult for the Defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to be certain on which side the truth lay. The Court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression. I am of opinion that the undertaking was not intended to apply where the injunction was wrongly granted, owing to the mistake of the Court, as for

instance, if the Judge was wrong in his law. I think this is shewn by the fact that such an undertaking is never inserted in a final order for an injunction.

The case is not at all like that of an action for damages. The injunction does not restrain the Defendant altogether from going on with his building, but only restrains him from building so as to produce a certain result. Still where the Court, by granting the injunction, has said that what the Defendant is doing is *primâ facie* an infringement of the Plaintiff's rights, and where the circumstances of the property are such that the Defendant may reasonably cease building altogether for fear of the consequences, and sustains damage by so doing, then if the Court is of opinion that the injunction was improperly obtained, the Defendant ought to have damages. But the Court has a discretion, and before it will grant damages it must be satisfied that the injunction was improperly obtained, and that the Defendant reasonably abstained from going on with his building, and that under all the circumstances damages ought to be given. It may happen that an interlocutory injunction is dissolved for delay or some cause which disentitles the Plaintiff to an interlocutory injunction, though not to relief at the trial, and then at the trial a perpetual injunction is granted. The Court in such a case has a discretion whether, under all the circumstances, the Defendant ought to have damages in respect of the interlocutory injunction having been improperly granted, though a perpetual injunction is granted at the trial. Then, again, the Court must have regard to the amount of damage; if it be trifling or remote the Court would not be justified in directing an inquiry as to damages, though the injury might not be so remote that an action would not lie. Then again the time at which the application is made is material. Having regard to the decisions, we are not entitled to say that the application for an inquiry must be made either when the injunction is dissolved or at the trial. One of these must be the most proper time. The application may be made when the injunction is dissolved, but if made then it probably will be ordered to stand over till the trial. If made by motion subsequently to the trial, the party moving is subject to some disadvantage, for the application is one which should be made speedily, and not after the Court has forgotten

C. A. 1882 SMITH v. DAY. Jessel, M.R.

the circumstances. After a lapse of time the statement of counsel is not enough; there must be evidence that damages have been incurred. In *Newby* v. *Harrison* (1) an inquiry was directed after four months, and I do not say that special circumstances might not induce the Court to allow more, but had it not been for that case I should have thought four months too long.

In the present case, almost every one of the points to which I have adverted is against the Defendant. The injunction was granted in November, 1879, and dissolved by the Court of Appeal in February, 1880. The action was dismissed by the Court of Appeal in June, 1881, and the present application was not made till February, 1882. I am of opinion that the time is too long.

Suppose the Court doubts which side is really in the right, but considers that it is a case for an interlocutory injunction before the trial, and grants an injunction until the trial. In such a case the application for an inquiry as to damages would most properly be made at the trial if the result of the trial is favourable to the Defendant. In the present case the Judge at the trial decided in favour of the Defendant as regarded light, and in favour of the Plaintiff as regarded air. That decision was appealed from: it proved that the Plaintiff had not made out any title, and in June, 1881, the action was dismissed with costs. Eight months afterwards this notice of motion is given. In my opinion that is too long in the absence of special circumstances, for damage, if there was any, had been sustained before the interlocutory appeal, so all the facts were known to the Defendant at the trial.

Apart from this, I am of opinion that there is no sufficient proof of any damage having been sustained, and that if any was sustained it is too remote for the present purpose. I might, indeed, say too remote for any purpose. It is said that the *Cab Company* had agreed to take a lease for seven years at a rack rent, but there was in fact no agreement, nothing but negotiations. [His Lordship then went into some particulars, shewing that the injunction did not prevent the erection of such buildings as were required by the *Cab Company*.]

But suppose there had been an agreement for a lease which the injunction prevented from being carried into effect. The damage

(1) 3 D. F. & J. 287.

is the difference between the rent agreed to be paid by the *Cab Company* and the value of the expectation of rent to be received from some other tenant. Is that a kind of damage as to which the Court should direct an inquiry? It seems to me that it is not.

BRETT, L.J.:—

The Defendant asks an inquiry to ascertain what damages he has suffered by reason of an interlocutory injunction which was granted on the 4th of November, 1879, and dissolved on the 18th of February, 1880. The only damage suggested is that the Defendant lost the benefit of an agreement for a lease of part of the property for seven years. The damages, if he could substantiate them, would be the difference between the rent to be received under that agreement, and the probable amount of rent to be received from some other tenant. The question is whether the Court ought to direct an inquiry as to these damages.

As regards the time when the application ought to be made, I do not think that we ought to lay down that it must be made at the time when the injunction is dissolved. I do not think that the applicant necessarily is to be allowed to postpone it till the trial, nor do I say that he never can successfully make the application after the trial. I think that he ought to make it within a reasonable time after the dissolution of the injunction, and that what is a reasonable time depends on the circumstances of the case. There often may be cases where it is reasonable to postpone the application till the hearing, and the case of *Newby* v. *Harrison* (1) shews that there is jurisdiction after the hearing, but I do not think it is to be treated as deciding that four months after the hearing is in no case too late. In the present case the application does not seem to me to have been made within a reasonable time.

Again, I am strongly of opinion that the question whether an inquiry as to damages should be granted is within the discretion of the Judge who originally tries the case, and that his discretion ought not lightly to be interfered with. In exercising this discretion the Court should act as nearly as may be on fixed rules,

(1) 3 D. F. & J. 287.

C. A. 1882 SMITH v. DAY. Brett, L.J.

or by analogy to fixed rules. Now in the present case there is no undertaking with the opposite party, but only with the Court. There is no contract on which the opposite party could sue, and let us examine the case by analogy to cases where there is a contract with, or an obligation to the other party. If damages are granted at all, I think the Court would never go beyond what would be given if there were an analogous contract with or duty to the opposite party. The rules as to damages are shewn in *Hadley* v. *Baxendale* (1). If the injunction had been obtained fraudulently or maliciously, the Court, I think, would act by analogy to the rule in the case of fraudulent or malicious breach of contract, and not confine itself to proximate damages, but give exemplary damages. In the present case there is no ground for alleging fraud or malice. The case then is to be governed by analogy to the ordinary breach of a contract or duty, and in such a case the damages to be allowed are the proximate and natural damages arising from such a breach, unless as in *Hadley* v. *Baxendale*, notice had been given to the opposite party, of there being some particular contract which would be affected by the breach. This doctrine of notice has introduced some difficulty into these cases, and it is not settled what sort of notice is sufficient. Here an alleged agreement for a lease is relied on. In the first place I do not think the existence of such agreement proved. If it did exist, the next question is, whether the injunction so interfered with the erection of the buildings as to entitle the tenant to throw up the agreement. I am not satisfied that it did. But assume that it did, and that the agreement was broken in consequence of the injunction, still I agree with the Vice-Chancellor in thinking that the breach is not by reason of the injunction, but is a consequence too remote to be regarded. If any one obtains an injunction preventing another from proceeding with a building, he must be taken to have notice of everything in the building contract, and all liabilities which the person stopped incurs to his contractor by reason of the stoppage, are a natural and immediate consequence of the injunction. But the fact that the injunction prevents the carrying out of an entirely independent agreement as to the property is too remote. When there has been such

(1) 9 Ex. 341. 18 Jur. 358

delay in making the application a very strong case of serious damage ought to be shewn.

COTTON, L.J.:—

The only question before us is whether Vice-Chancellor *Bacon* was right in refusing an inquiry as to damages. The Master of the Rolls has gone into the history of undertakings as to damages on the granting of interlocutory injunctions, and has limited their operation in a way with which I am not at present prepared to agree. His Lordship has laid down that no damages can be given under them unless there has been some default on the part of the party obtaining the injunction, so that there would be no remedy where the party obtaining the injunction ultimately turned out to have no title, unless he had been guilty of some misrepresentation or suppression. It would require a great deal of argument to convince me that this view is correct. In *Novello* v. *James* (1) the Lords Justices granted an inquiry as to damages where the injunction was dissolved because it had been granted on a wrong view of the law, and expressly put their judgment on that ground. It is true that there is no trace of the point suggested by the Master of the Rolls having been taken in argument, but when I find two such Judges as Lords Justices *Knight Bruce* and *Turner* laying down and acting upon the principle that an inquiry as to damages may be directed where an injunction has been improperly granted owing to the Court below having taken a wrong view of the law, I cannot, as at present advised, agree that the jurisdiction to give damages is limited to cases where there has been default on the part of the Plaintiff. It is alleged that the fact that an undertaking is never inserted in injunctions granted at the hearing shews that it is only inserted with a view to the party obtaining the injunction having been guilty of default. It appears to me that this is not so, and that the true reason of the difference is that when an interlocutory injunction is granted the Court does not decide any right, but only determines on what footing matters shall stand till the trial; but at the trial the rights of the parties are finally determined. If it were supposed that the Court of Appeal was unanimous in favour of the view of the Master of the

(1) 5 D. M. & G. 876. 1 Jur. N.S. 217.

C. A. 1882 SMITH v. DAY. Cotton, L.J.

Rolls, I think that the Courts of first instance might be led to deal with these cases in a way in which they ought not to be dealt with.

As regards the time of the application, there is no doubt that the failure to apply earlier does not deprive the Court of its jurisdiction founded on the undertaking. It is certainly desirable that the application should be made either at the time when the injunction is dissolved or at the hearing of the cause. No rule, however, has been laid down that it must be made at one or other of those times, and I do not say that the Court ought to lay down any express limit as to time, still I think that a long delay might of itself be fatal to the application. In the present case I do not think that there has been such delay as that. I think that here the Court would not have granted an inquiry at the time of dissolving the injunction, so I think that no objection can be sustained on the ground that the application was not made then. We have, however, an unexplained delay of eight or nine months after the trial. Now the Court has a discretion; it is not bound to grant an inquiry because some damages have been sustained, they may be trivial. The only damages suggested are that the Defendant lost the advantage of a beneficial lease which he had agreed to grant. It is not proved that there was a binding agreement to take a lease, and I agree with Lord Justice *Brett* that if there had been one, damages could not be recovered on that ground. I think that the damages must be confined to loss which is the natural consequence of the injunction under the circumstances of which the party obtaining the injunction has notice, as for instance a claim by the builder in consequence of the injunction compelling the Defendant to break his contract with him. In the present case no damages have been suggested except the loss of the tenancy, and after such delay I do not think that we ought to presume that there has been other damage.

JESSEL, M.R.:—

As regards the question raised by the observations of Lord Justice *Cotton* as to the extent of these undertakings, my individual opinion is that in no case can a party be compelled under such an undertaking to pay damages because the Judge has made

a mistake on a point of law. It is the duty of the Judge to decide according to law, and the Plaintiff cannot be considered as undertaking to be answerable for his not doing so.

C. A. 1882 SMITH v. DAY.

BRETT, L.J. :—

I have given no opinion on that point, and I do not intend to do so.

Solicitors for Plaintiffs: *F. & T. Smith & Sons.*
Solicitor for Defendant: *R. H. Ward.*

H. C. J.

In re KIRK.
KIRK *v.* KIRK.

[1880 K. 1059.]

C. A. 1882 FRY, J. *Feb.* 11. C. A. *July* 18.

Will—Construction—Devise on Condition that Devisee shall relinquish Debt due to him by Testator—Death of Devisee before Testator.

A testator devised land at *M.* to his son *R.* in fee, on the express condition that *R.*, his executors or administrators, should, within three months after the testator's death, relinquish all claim to a sum of £3400 due to him by the testator. And he devised other land to trustees, on trust for sale, and to stand possessed of the proceeds of sale, after payment of the deficiency (if any) of his residuary personal estate to pay his debts as thereinafter mentioned, on trust for his wife for her life, with remainder in trust for some grandchildren. And he devised all other his real estate not thereinbefore disposed of to his sons *J.* and *R.* in fee, in equal shares. And, after making some specific bequests of personal estate, he bequeathed the residue of his personal estate to trustees upon trust for conversion, and to stand possessed of the proceeds upon trust to pay his debts (except the debt of £3400 due to *R.* and two other specified debts), and on trust to retain the surplus for the benefit of his sons *J.* and *R.* in equal shares. But, in case his residuary personal estate should be insufficient to pay his debts (except as aforesaid), he directed that the deficiency should be paid out of the proceeds of the sale of the real estate which he had directed to be sold. *R.* died before the testator without issue:—

Held (affirming the decision of *Fry*, J.), that the condition bound the land at *M.* notwithstanding the lapse of the devise, and that the debt of £3400 must be discharged out of it.

JOHN KIRK, by his will dated the 31st of May, 1878, appointed his sons *J. A. Kirk* and *Robert Kirk* trustees and executors of his

C. A. 1882

In re KIRK. KIRK *v.* KIRK.

will. And he devised to *Robert Kirk* in fee a close of land called *Byron's Close*, and certain other closes of land situate at *Mablethorpe*. And the testator declared that the said devise to *Robert Kirk* was made to him upon the express condition that the said *Robert Kirk*, his executors or administrators, should, within three calendar months next after the testator's decease, relinquish and give up all claim to the sum of £3400, being the balance of several principal sums of money due on and secured by two several promissory notes given by him to the said *Robert Kirk*, and by an equitable charge on the said lands and hereditaments thereinbefore devised, or on some part thereof, or to so much and such part of the said sum as should be due and owing from him at the time of his decease, and to all interest for or in respect of the same, and deliver to his co-executor *J. A. Kirk* the said promissory notes and equitable charge to be cancelled or otherwise dealt with as the said *J. A. Kirk* should think proper. And the testator bequeathed to his wife and her assigns for her life an annuity or yearly rent-charge of £70, to be chargeable upon and yearly arising and payable out of two closes of land at *Theddlethorpe*, and, subject and charged as aforesaid, he devised those two closes to *Robert Kirk* in fee. And the testator devised to *J. A. Kirk* in fee another estate at *Mablethorpe* containing 200 acres. And he declared that the said devise to *J. A. Kirk* was made upon the express condition that he should, within three calendar months after the testator's decease, relinquish and give up all claim to the sum of £3000 which he had advanced on account of the purchase-money of the same hereditaments thereinbefore devised to him, and to the interest of the said sum, or to so much and such part of the said sum as should be owing from the testator at the time of his decease. And the testator devised to *J. A. Kirk* and *Robert Kirk* in fee a house and land called *Stewton House*, upon trust to make sale and dispose thereof, and to stand possessed of the net moneys to arise from the sale upon trust, after payment of the deficiency (if any) of his residuary personal estate as thereinafter mentioned to pay and discharge his just debts, funeral expenses, and the charges of proving his will, to invest the net moneys as therein mentioned, and to pay the income thereof to his wife, or her assigns, for her life, and

after her death to stand possessed of the said trust moneys and securities in trust for five of the testator's grandchildren therein named. And the testator devised all other his real estate not thereinbefore disposed of to *J. A. Kirk* and *Robert Kirk* in fee, in equal shares as tenants in common. And, after making some specific bequests of personal estate, the testator bequeathed the residue of his personal estate unto *J. A. Kirk* and *Robert Kirk*, upon trust to convert the same into money, and to stand possessed of the moneys arising from such conversion upon trust therewith to pay and discharge his just debts (except a mortgage debt of £4000, and the said debts due to his said sons respectively), funeral expenses, and the charges of proving his will, and, after payment thereof, upon trust to retain the surplus for the benefit of his said sons in equal shares; but in case his said residuary personal estate should be insufficient to pay and discharge his just debts (except as aforesaid), funeral expenses, and the charges of proving his will, then he directed that the deficiency should be paid and discharged out of the moneys which should arise from the sale of his real estate thereinbefore directed to be sold.

By a codicil dated the 26th of July, 1879, the testator appointed *Joseph Hardy* to be an executor and trustee of his will jointly with his son *J. A. Kirk*. And the testator revoked the bequest of a share of the proceeds of sale of the *Stewton House* estate to one of the grandchildren named in his will, and he gave those proceeds (subject to the life interest of his wife and to the payment of any deficiency of his residuary personal estate to pay his debts, funeral and testamentary expenses), as to £800, part of such clear proceeds, in trust for the other four of his grandchildren named in his will, and as to £100, part thereof, to the widow of his late son, *W. E. Kirk*, and he declared that the residue of such clear proceeds should form part of his residuary personal estate.

The testator died on the 16th of July, 1880. The son, *Robert Kirk*, had died in the testator's lifetime, without leaving any issue him surviving.

At the time of the testator's death the £3400 mentioned in the will as due to him from his son *Robert Kirk* was still owing, but it was not the fact, as stated in the will, that that sum or any part of it was in any way charged on any real estate of the testator.

C. A. 1882 — *In re* KIRK. KIRK *v.* KIRK.

This action was brought by the surviving executor against the testator's widow, his heir-at-law, and the four grandchildren named in the will, claiming a declaration out of what part or parts of the testator's estate and in what order, the debt of £3400 and the interest thereon ought to be paid; and that so far as might be necessary the real and personal estate of the testator might be administered and the trusts of his will and codicil performed under the direction of the Court.

By the judgment at the trial of the action on the 8th of April, 1881, various accounts and inquiries were directed to be taken and made.

The Chief Clerk by his certificate, dated the 29th of November, 1881, found that the only debt of the testator remaining unpaid was the debt of £3400 due with interest to the legal personal representative of his son *Robert Kirk*, and that the only outstanding personal estate of the testator not specifically bequeathed was a balance of £156 10*s.* 2*d.*, in the hands of the executors and some furniture and other chattels in the possession of the executors, and valued at £287 4*s.* 9*d.* The Chief Clerk submitted to the Court the question whether the testator's personal estate not specifically bequeathed was or was not exonerated from the payment of the debt of £3400 and interest due to the son *Robert Kirk*.

The case was heard before Mr. Justice *Fry* on the 11th of February, 1882.

Locock Webb, Q.C., and *Dryden*, for the Plaintiff:—

The estate devised to *Robert Kirk* is not charged with the payment of the £3400. There is nothing in the will but a condition binding him personally that he shall not have the estate without releasing the debt, and, as he died before the testator, that condition has become inoperative.

J. Pearson, Q.C., and *Onslow*, for the four grandchildren:—

The estate devised to *Robert Kirk* is primarily liable to pay the £3400. The condition was intended for the benefit of the persons who are interested in the residue of the testator's personal estate. The devisee was made, as it were, a trustee of part of the value of

the estate for those persons; and the trust does not fail because there is not a trustee in existence. The estate falls into the residue *cum onere*, with the charge upon it: *Wigg* v. *Wigg* (1); *Hills* v. *Wirley* (2); *Oke* v. *Heath* (3). And, while the testator has expressly said that the deficiency of his personal estate to pay his debts shall be discharged out of the proceeds of sale of the *Stewton* estate, he has defined the word "debts" as excluding the debt of £3400.

Cozens-Hardy, Q.C., and *W. Phipson Beale*, for the heir-at-law, advocated the same view.

Locock Webb, in reply.

FRY, J. (after stating the provisions of the will and the other facts, continued):—

It is obvious that the testator intended that his residuary personal estate should not pay the £3400, and also that he intended that the proceeds of sale of his *Stewton* estate should pay his debts (except the £3400, and two other specified debts), only so far as his residuary personal estate should be insufficient. The question is whether the estate which was devised to *Robert Kirk* ought not to bear the £3400. Several circumstances must be borne in mind. First of all, there is the express condition that *Robert Kirk* shall release the debt of £3400, that is to say, a burden is cast upon him in order to confer a benefit on the persons who would otherwise have had in effect to pay the £3400 out of the property given to them by the testator. It is as if the testator had increased his residuary personal estate by means of a charge in equity upon the estate which he devised to *Robert Kirk*. This is in accordance with what is said by Lord *Hardwicke* in *Wigg* v. *Wigg* (4): "*A.* devises land to *B.*, on condition to pay *C.* a sum of money and no clause of entry; this is no charge on the estate to give the legatee of the money a lien on the lands, but the heir-at-law shall enter and take advantage of the breach of the condition, and yet in this Court he shall be considered

(1) 1 Atk. 382.
(2) 2 Atk. 605.
(3) 1 Ves. Sen. 135.
(4) 1 Atk. 383.

C.A. 1882 *In re* KIRK. KIRK *v.* KIRK. Fry, J.

only as a trustee for the legatee." In other words, the heir will be bound if the Court can see that the real intention of the testator was to create a trust.

The next material circumstance is this, that the testator himself says that the debt due to *Robert* is secured by an equitable charge on the land which he devises to him, and, though this was in terms an erroneous recital, still it is a circumstance which must be taken into account.

The next thing is that the testator has exempted his residuary personal estate from payment of the £3400, and this is strong evidence of his intention that the estate which he devises to *Robert* shall bear the £3400 in any event. Another consideration which is not without some weight is, that, if this were not so, *Robert* would, under the residuary devise of real estate to him and his brother, *J. A. Kirk*, have taken a moiety of the estate even if he had refused to release the debt of £3400. The codicil has not altered the provisions of the will in this respect. Therefore, on a view of the whole of the clauses of the will, I come to the conclusion that the testator intended that the estate which he devised to *Robert* should bear the debt of £3400 in any event, and I shall make a declaration to that effect.

W. L. C.

C. A.

From this decision the Plaintiff appealed.

The appeal was heard on the 18th of July, 1882.

Locock Webb, Q.C., and *Dryden*, for the Appellants :—

The decision in *Wigg* v. *Wigg* (1) and the other cases cited by the other side are not applicable, because in them there was a legatee named who was to have the benefit of the condition, and therefore the Court held that there was a constructive trust for his benefit. But here there is no legatee for whose benefit the condition is imposed. It was simply imposed for the benefit of the estate generally, and as the devisee is dead it has become inoperative.

J. Pearson, Q.C., and *Onslow*, for the four grandchildren, were not called on.

(1) 1 Atk. 382.

JESSEL, M.R.:—

This question is a very singular one. There is a gift of a freehold estate to a man who was a creditor of the testator, and was also the testator's son. [His Lordship read the devise and residuary gift as set forth above, and proceeded.] Therefore it is to be observed that the testator twice directs in the residuary clause that this debt of £3400 to his son *Robert* shall not be paid out of his residuary estate. *Robert* died in the testator's lifetime, and the question now is whether the £3400 is charged upon the *Mablethorpe* estate which was devised to him.

Now the question has been argued with reference to certain authorities, but I should like to say first what my view of the authorities is. My view of those authorities is this, that though the words "on condition" may be used by a testator, he does not mean to leave it to the choice of the devisee to say whether or not the person who is to take the benefit which is the subject of the condition, is to have it or not. The form looks like it, but the substance is not so. The substance is that he intends the legatee or devisee to perform the condition, and the person who takes the benefit of it is to have it in any event. In other words, it is that he does not intend the devisee, by refusing to perform the condition, to disappoint the person whom I will call the legatee, nor does he intend the death of the devisee to disappoint the legatee.

Well, if that is the principle, the only question left is this, is there any sound distinction between a condition to pay a sum of money to a legatee, or an annuity to a legatee, or a condition to give a valuable thing to a legatee, and a condition that his personal estate shall be exonerated from a debt? I think there is no sound distinction. I think a direction to exonerate his personal estate from a debt is equivalent in substance to a gift to the person who would be entitled to the personal estate. It does not appear to me that this is to be limited to a residuary legatee, but that it extends to everyone, to creditors, to general legatees, to residuary legatees, and to whoever will get the benefit of the sum of money from which the personal estate is exonerated.

I think that is the substance of it, and I should therefore have come to the same conclusion as Mr. Justice *Fry* if there had been

C. A. 1882 *In re* KIRK. KIRK *v.* KIRK. Jessel, M.R.

nothing in the will except the direction that *Robert* should exonerate the personal estate from the £3400. But, as was observed by the learned Judge, there are two other indications in the will, though I think they are not needed for this purpose; one is the fact that the estate is really subjected to the charge, and the other is the express direction not to pay out of the residuary estate. As I said before, I think the first words shew that it is not to be paid out of the residuary estate, and therefore I do not think it necessary to resort to them; but were my conclusion not sufficiently supported by the first words, I should still agree with the learned Judge of the Court below that those two sets of expressions confirm the view which I should have been disposed to take without their assistance. The appeal must be dismissed.

BRETT, L.J.:—

I am of the same opinion. I should have supposed that this case was governed by the case of *Wigg* v. *Wigg* (1), even if there had been no words of exception in the residuary clause. I cannot help thinking that the decision in the case of *Wigg* v. *Wigg* was that if a person leave an estate subject to the payment of an annuity, or a sum of money in this way, he attributes the estate to the payment of the annuity, and because he attributes the estate to the payment of the annuity, he charges the estate with the payment of the annuity. Therefore it seems to me here that the testator has attributed this particular estate to the payment of his debt, and if he has attributed this estate to the payment of his debt, he has thereby charged the estate with the payment of the debt, and therefore it comes precisely within the principle of *Wigg* v. *Wigg*.

COTTON, L.J.:—

If this will had only contained the devise to *Robert Kirk*, and the condition thereby imposed, I do not think that it would have been necessary to decide it in the way Mr. Justice *Fry* has done. But we must not take that alone. There is in addition the direction at the end of that devise, that the security on the per-

(1) 1 Atk. 382.

C. A. 1882 *In re* KIRK. KIRK *v.* KIRK.

sonal estate is to be delivered up to the co-executor of *Robert* to be cancelled, and also the further direction that all debts shall be paid except a debt of £4000 which has been mentioned, this debt of £3400 and another debt of £3000 due to another son, the devisee of an estate which stands in exactly the same position as regards possession, and when we take all these together I think we cannot but say that the testator's will shews that he intended that the son taking the estate should give up the £3400 for the benefit of the persons interested in the personal estate. That is really just the same as if he had given this sum of £3400 to somebody else not having any previous claim at all. Then that being so neither the wish of the devisee not to comply with the condition, nor his death so that the devise could not take effect, ought, in my opinion, to defeat what is the expressed intention of the testator on the face of his will, that his real estate should be charged with the £3400 for the benefit of those interested in the personal estate; and that being so, although there is a lapse, yet the charge still remains in exoneration, in my opinion, of the personal estate.

Solicitor for Plaintiff and some Defendants: *W. R. A. Kime*, agent for *Wilson & Son, Louth.*

Solicitor for heir-at-law: *G. A. Hall.*

M. W.

Ex parte PRATT. *In re* HAYMAN.

C. A. 1882 *July* 20.

Practice—Witness examined under Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 96—*Right to Copy of Depositions—Creditor—Bankruptcy Rules*, 1870, *rr.* 9, 12.

The Court has a discretion whether to give a copy of the shorthand notes of the deposition of a witness examined under sect. 96 of the *Bankruptcy Act*, 1869, but where a creditor had been so examined he was allowed a copy.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

John Hayman, a bootmaker at *Cambridge Heath*, was adjudicated a bankrupt on the 10th of November, 1881. The trustee in the bankruptcy on the 16th of June, 1882, gave notice to *G. T.*

C. A. 1882 *Ex parte* PRATT. *In re* HAYMAN.

Whichelow, a leather merchant at *Bermondsey*, of an application to the Court of Bankruptcy that *Whichelow* should deliver up to the trustee certain goods which he had obtained from the bankrupt, or pay the value thereof. The trustee filed an affidavit in support of this application, in which he alleged that the goods in question had been delivered by the bankrupt to *Whichelow* by way of fraudulent preference.

Whichelow had been previously privately examined in the Court of Bankruptcy at the instance of the trustee, under sect. 96 of the *Bankruptcy Act*, 1869, and the examination had been completed. The trustee in his affidavit said that he was enabled to depose to the facts stated therein from the knowledge acquired by him as trustee, and from the admissions of *Whichelow*. In his notice of motion the trustee did not say that he intended to use the depositions of *Whichelow* in support of his application; he only gave notice that he intended to use his own affidavit. On the 20th of June, *Whichelow's* solicitor bespoke at the office of the Court an office copy of the shorthand writer's notes of the evidence of *Whichelow* at his private examination, and paid the required deposit. A transcript of the notes was on the file of the proceedings. *Whichelow* had proved as a creditor in the bankruptcy. On the 22nd of June his solicitor was informed by the officer of the Court that the trustee had lodged a notice objecting to his being furnished with an office copy of the transcript.

Whichelow then applied to the Court, and the Registrar ordered that he should be supplied at his own cost with an office copy of his own depositions. The trustee appealed.

Sidney Woolf, for the Appellant:—

A witness has no absolute right to a copy of his own depositions; the trustee has not given notice that he intends to use them. Rule 9 (1) of the Bankruptcy Rules, 1870, does not

(1) Rule 9: "All proceedings of the Court shall remain of record in the Court, so as to form a complete record of each matter, and they shall not be removed for any purpose, except for the use of the officers of the Court, or by special direction of the Judge or Registrar, but they may at all reasonable times be inspected by the trustee, the bankrupt, and any creditor who has proved, or any person on their behalf."

Rule 12: "All office copies of petitions, proceedings, books, papers, and

apply, and if it does, it only gives a right of inspection at reasonable times.

[*Cooper Willis*, Q.C., for the Respondent, referred to rule 12.]

[JESSEL, M.R.:—As a witness the Respondent has no right to the copy, but he claims it as a creditor, and the Registrar has thought fit to allow it. Can you appeal against that order?]

The Registrar held that as a witness examined under sect. 96, he had an absolute right to the copy.

[JESSEL, M.R.:—The Registrar must have known that he had a discretion in the matter; he could not have intended to say that it was a matter of right.

BRETT, L.J.:—The Respondent must be entitled to see the admissions which he has made.]

The Registrar held that every bankrupt and every witness is entitled to a copy of his own depositions. This was certainly not the practice formerly. The trustee has obtained in this way information to guide him in realizing the bankrupt's assets; it would be most injurious to the creditors if the Respondent is allowed to have a copy of the depositions before he has put in his answer to the trustee's application.

Cooper Willis, Q.C., and *English Harrison*, for the Respondent:—

The application for the copy was made by the Respondent in the character of a creditor, and under rule 9 he is entitled to the copy.

[JESSEL, M.R.:—In *Ex parte Rimell* (1) it was held that a creditor of a bankrupt was not entitled to inspect the proceedings in a bankruptcy, except on a "reasonable" request.]

---

writings, or any parts thereof required by any trustee, or by any person being a bankrupt or debtor who has instituted proceedings under sects. 125 or 126 of the Act, or by any creditor of any such person, or attorney of any such person or creditor, shall be provided by the Registrar, and shall, except as to figures, be fairly written at length, and be sealed with the seal of the Court, and delivered out without any unnecessary delay, and in the order in which they shall have been bespoken, and be charged and paid for at the rate of 2*d.* per folio of seventy-two words."

(1) 1 D. M. & G. 491.

C. A. 1882

Ex parte PRATT. *In re* HAYMAN.

The words "reasonable request," which were used in sect. 232 of the *Bankruptcy Act* of 1849, are omitted from the present rule 9. How can the other creditors be injured by the Respondent having a copy of his own depositions? What the trustee really wants is to make the Respondent perjure himself if he can.

[They were stopped by the Court.]

JESSEL, M.R.:—

I think the Registrar could not have meant to say that the furnishing a copy of the depositions was a matter of strict right; he can only have meant that under the circumstances the Respondent was entitled to have the copy. I cannot see any reason why he should not have a copy of that which he has himself sworn.

BRETT and COTTON, L.JJ., concurred.

Appeal dismissed with costs.

Solicitor for Trustee: *H. Montagu.*
Solicitor for Respondent: *E. Chalk.*

W. L. C.

C. A. 1882

C. J. B. *May* 1, 8.

C. A. *July* 20.

Ex parte VOISEY. *In re* KNIGHT.

Mortgage—Attornment Clause—Validity—Bankruptcy of Mortgagor—Mortgage to Building Society—Advance repayable in Monthly Instalments—Monthly Tenancy—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 1 [*Revised Ed. Statutes, vol. i. p.* 774]—*Lease not in writing*—"*Uncertain*" *Rent.*

22 Ch D 285
57, 390
343.
11 QBD 577

A member of a building society borrowed £7500 from the society, which was to be repaid in a series of monthly instalments of £71 17*s.* 6*d.* each, including interest at 7 per cent. The instalments were payable at the monthly meetings of the society, and, if the member neglected to pay them, when due he became liable to a fine, at the rate of 5 per cent. per month on the total amount in arrear and unpaid at each meeting. To secure the loan he executed to the trustees of the society a mortgage of real estate. The deed contained a proviso that if the member should fail for three monthly meetings to pay his subscriptions, interest, fines, or other moneys, or to observe the regulations of the society, or in the event of his becoming bankrupt, the mortgagees might enter into possession or receipt of the rents of the mortgaged property. And "for the better securing the payments which by the rules of the society ought to be made by the mortgagor," it was agreed

that, if the mortgagees should at any time become entitled to enter into possession or receipt of the rents, and the mortgagor should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mortgagees, at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mortgagor from time to time for subscriptions, interest, fines, and other moneys under the rules, and that the tenancy should commence on the day up to which he should have fully paid all and every part of such subscriptions, interest, fines, and other moneys, and the rent for the period intervening between the commencement of the tenancy and the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable and paid on that day, and the monthly rent due upon and subsequently to that day should become due monthly in advance, and be payable at the monthly meetings, the first payment of rent becoming due on the day on which the mortgagees should first become entitled to enter into possession. Power was given to the mortgagees to determine the tenancy by fourteen days' notice.

The deed was not executed by the mortgagees, nor was it registered under the *Bills of Sale Act*. The mortgagor committed default in his payments, and was afterwards adjudicated a bankrupt:—

Held, that the attornment clause, and distresses levied under it for rent which accrued due both before and after the commencement of the bankruptcy, were valid as against the trustee in the bankruptcy.

Decision of *Bacon*, C.J., affirmed.

Held, that it was no objection to the attornment clause that the monthly rent was fluctuating in amount.

A rent the amount of which may fluctuate according to the happening of certain events is not an uncertain rent.

Held, also, that the tenancy under the attornment clause was not made by sect. 1 of the *Statute of Frauds* a tenancy at will.

Ex parte Williams (1); *In re Stockton Iron Furnace Company* (2); and *Ex parte Jackson* (3), discussed.

JOHN KNIGHT, a manure manufacturer, at *Farnworth*, near *Widnes*, in *Lancashire*, was a member of the *West Derby and Everton Perpetual Benefit Building Society*, in which he held 750 shares. In August, 1875, he received from the society in respect of these shares an advance of £7500 (*i.e.*, at the rate of £10 per share) which, according to the rules of the society, was to be repaid, with interest at the rate of 7 per cent. per annum, in a series of monthly instalments of £71 17*s.* 6*d.* each. These instalments were payable at the monthly meetings of the society, which were held on the second Wednesday in each month, and in case

(1) 7 Ch. D. 138. (2) 10 Ch. D. 335.
(3) 14 Ch. D. 725.

C. A. 1882

Ex parte VOISEY. *In re* KNIGHT.

the member neglected to pay his monthly subscription when it became due he became subject to a fine at the rate of 5 per cent. per month on the total amount in arrear and unpaid at each monthly meeting.

On the 3rd of August, 1875, *Knight*, in consideration of the advance of the £7500 by the society, executed to the trustees of the society a mortgage of his manufactory and certain pieces of land, with the steam engines, machinery, and other things of the nature of real estate erected thereon, and also of the engines, machinery, apparatus, stock-in-trade, and effects in the nature of personal estate in or about the premises. The mortgage was subject to a proviso for redemption if the mortgagor should duly make all the payments, and observe and perform all the regulations provided by the rules of the society, both in respect of the 750 shares and of the shares which he might thereafter hold in the society, and which on his part ought to be made, observed, and performed. The deed provided that, in case the mortgagor should at any time thereafter fail, neglect, or refuse for three monthly meetings of the society to pay all or any of his subscriptions, interest, fines, and other moneys, or to observe and perform the regulations, on his part to be paid, observed, and performed, or in the event of his becoming bankrupt or filing a liquidation petition, or making any assignment for the general benefit of his creditors, then and in any of such cases the mortgagees might, without any further consent on the part of the mortgagor, enter into possession or receipt of the rents and profits of the mortgaged premises, but should the same be insufficient in their judgment to satisfy the purposes of the mortgage deed, then the mortgagees might sell the mortgaged premises, and should apply the net proceeds of sale in payment of the moneys due to the society. And, for the better securing the payments which by the rules of the society ought to be made by the mortgagor, it was thereby agreed and declared that, if the mortgagees should at any time, by virtue of the mortgage deed, or of the rules for the time being of the society, become entitled to enter into possession or receipt of the rents and profits of the mortgaged premises, and the mortgagor should then or afterwards be in the occupation of the whole or part of the premises, he should during such occupation be

tenant thereof from month to month to the mortgagees, at a monthly rent of such a sum as should be equal in amount to the moneys that ought to be paid monthly by the mortgagor from time to time for subscriptions, interest, fines, and other moneys under the rules, and such tenancy should commence upon the day up to which the mortgagor should have fully paid all and every part of such subscriptions, interest, fines, and other moneys, and the rent for the period intervening between the time of such commencement of tenancy and the day upon which the trustees should be entitled to enter into possession or receipt of the rents of the mortgaged premises should be payable and paid on such last-mentioned day, and the monthly rent due upon and subsequently to such last-mentioned day should become due monthly in advance, and be payable at the place and on the day and during the hours where and when the monthly meetings of the society should from time to time be held, and the first payment of such rent should become due on the day on which the mortgagees, or other the trustees for the time being of the society, should first become entitled to enter into possession or receipt of the rents and profits of the mortgaged premises, but all moneys received by them for rent should be accepted in or towards satisfaction of the subscriptions, interest, fines, and other moneys then in arrear or payable under the rules and the mortgage deed respectively, so far as the moneys so received should extend. Provided always, that it should be lawful for the mortgagees, after giving fourteen days previous notice of their intention so to do, to enter upon and take possession of the mortgaged premises, and to determine the tenancy created as aforesaid.

The deed was not executed by the mortgagees, nor was it registered under the *Bills of Sale Act*.

On the 2nd of December, 1881, *Knight* having been in default in making the payments due from him at three monthly meetings of the society, the trustees levied a distress on the mortgaged premises for £664, the whole amount then due from him to the society, he being still in occupation of the property. On the same day a bankruptcy petition was presented against *Knight* in the *Liverpool* County Court, founded on an act of bankruptcy committed by him on the 26th of November, 1881, and on the 5th of

C. A. 1882 *Ex parte* VOISEY. *In re* KNIGHT.

December he was adjudicated a bankrupt. On the 21st of December two trustees of his estate were appointed. On the 11th of January, 1882, the trustees of the building society put in a second distress on the mortgaged premises for £255, the further amount then due by *Knight* to the society. In February, 1882, the trustees of the building society put in a third distress for £127.

On the 10th of March, 1882, the trustees in the bankruptcy applied to the County Court for an order declaring the attornment clause and the distresses levied in pursuance of it void as against them, and on the 21st of March the Judge made an order to that effect, and restrained the mortgagees from further proceedings to distrain. The Judge was of opinion that the case was governed by *Ex parte Williams* (1).

There was evidence that, before the mortgage was made, and with a view to it, the property was valued by three different valuers employed on behalf of the society, the amount of each of the three valuations exceeding £12,000, and that another valuation was made on behalf of the bankrupt at £11,166. One witness said that a fair rental for the property would be 7 per cent. on the mean of these valuations, or £840 per annum. Another witness said that £940 would be a fair rent, and another that a fair rent would be 10 per cent. on the mean of the valuations.

On the other hand, one of the trustees in the bankruptcy, who had been formerly a surveyor, deposed that he thought £500 a year would be the outside value of the property, and that it would not sell for more than £9000. For the purpose of poor rates the property was in 1881 assessed at a gross value of £288, and a rateable value of £216. He admitted that property in the neighbourhood had decreased in value very considerably since 1875. Two other surveyors were examined. One of them said that he valued the property at that time at £7513, and that £500 a year would be an outside rental. The other valued the property then at £7486, and said that the annual rental would be from £450 to £500, certainly not over £500.

The trustees of the building society appealed to the Chief Judge.

The appeal was heard on the 1st and 8th of May, 1882.

(1) 7 Ch. D. 138.

Horton Smith, Q.C., and *J. E. Linklater*, for the Appellants :—

The annual rent under the attornment clause, exclusive of interest on arrears, amounted to £862 10*s*. This is not an excessive rent, and the principle of *Ex parte Williams* (1) does not apply. It is not such a rent as to cover the whole principal debt: *In re Stockton Iron Furnace Company* (2); *Ex parte Auckland Building Society* (*Bacon*, C.J., 10th Feb. 1879). Excessive amount of rent was an element in the decision of *Ex parte Jackson* (3); and a fair rent, reserved only for the purpose of securing payment of interest, supported the clause in *Ex parte Punnett* (4). In *In re Threlfall* (5) it was held that a tenancy under an attornment clause was a tenancy from year to year; and in *Ex parte Harrison* (6) that the proceeds of a distress for rent under an attornment clause might go in reduction of principal as well as of interest. Then the case of *Provident Permanent Building Society* v. *Greenhill* (7) decided that fines secured by covenant in a mortgage to a building society formed part of the principal debt; and that capitalization of interest in arrear is not unlawful, appears from *Clarkson* v. *Henderson* (8).

The County Court Judge has taken the amount of monthly instalments "from time to time" payable, as £87 4*s*. 2*d*., and multiplying this by twelve, has considered the rent under the attornment clause to amount to £1046 10*s*. But this is erroneous; the true monthly rent was only £71 17*s*. 6*d*. It cannot be said that this was a sham rent, nor a rent reserved for payment of principal in a lump sum; it was a rent based upon the actual value of the land. The parties to the deed took every precaution to ascertain the true value, and it is notorious that surveyors of building societies are disposed to undervalue property rather than otherwise. It was valued at £12,000 for the purpose of the loan, and if so was worth £15,000 to a fancy purchaser.

[BACON, C.J. :—How can I speculate as to the value?]

That is precisely what the Respondents want the Court to do.

(1) 7 Ch. D. 138.
(2) 10 Ch. D. 335.
(3) 14 Ch. D. 725.
(4) 16 Ch. D. 226.
(5) 16 Ch. D. 274.
(6) 18 Ch. D. 127.
(7) 9 Ch. D. 122.
(8) 14 Ch. D. 348.

C. A. 1882

Ex parte VOISEY. *In re* KNIGHT.

Winslow, Q.C., and *Mulholland*, for the trustees in the bankruptcy:—

The agreement stipulates that the rent shall be at the amount of the "moneys that ought to be paid monthly" by the mortgagor "from time to time for subscriptions, interest, fines, and other moneys under the said rules," not merely the amount which happened to be due from the mortgagor on the 13th of August, 1878. The effect of this is that, without taking any fines into account at all, the monthly instalment due was £87 4*s.* 2*d.*, and the annual rent £1046 10*s.* This is a larger amount than the Appellants' own valuations, for £7 per cent. on £12,000 would be only £840. Such a difference brings the case within the principle of *Ex parte Williams* (1).

No doubt the question must be argued from the state of the case at the inception of the contract. Taking it so, would the Appellants have got anybody to give £1046 as the rent of this property? In *Ex parte Jackson, Baggallay*, L.J., says (2) he has no doubt that if the rent reserved by the attornment clause in *In re Stockton Iron Furnace Company* (3) had been excessive, "in the sense in which the Court would consider it excessive," the decision would have been the other way. No real tenancy was ever contemplated by these parties; it was merely a device to enable the mortgagees to come in and distrain for all arrears in the shape of subscriptions, fines, and compound interest due at the date of the bankruptcy.

It is argued that the tenancy commenced on the 13th of August. If so, the deed, never having been executed by the mortgagees, could operate only to create a tenancy at will, or a tenancy which only by payment of rent after entry within three years could be turned into a tenancy from year to year. *Morton* v. *Woods* (4) was not this case. Here there was no present attornment, only an agreement for a future tenancy.

We say then, first, upon the construction of the deed, the amount of rent reserved was £1046 10*s.*, irrespective of the fines; secondly, that this amount was excessive and beyond the value of the property; thirdly, that there was no attornment,

(1) 7 Ch. D. 138.
(2) 14 Ch. D. 736.
(3) 10 Ch. D. 335.
(4) Law Rep. 4 Q. B. 293.

because the deed was not executed by the mortgagees, and no tenancy arose until the 13th of August, 1878.

BACON, C.J. :—

The question I have to decide is whether what has been called a rent is, as in *Ex parte Williams* (1) it was held to be, a contrivance to defeat the law in bankruptcy. If it is not that, there cannot be one word said against this plain mortgage deed. To make that principle applicable, it has been argued that the rent is plainly excessive. In my judgment there is no measurement whereby the rent can be called excessive.

What is the contract between the parties? A borrower, a shareholder in a building society, gets an advance of £7500. He mortgages his property, that is to say, the fee simple of his property, not the chattels, which may or may not have been of value, but which occupy a large portion of the description in the assignment. He gets an advance made upon the security of his freehold property. What is his contract? That he will pay that back by instalments. It has nothing to do with rent. You cannot measure it by any proportion that the rent might bear to the value of the property; but he promises to pay in the shape of subscriptions as long as they shall become due; that is to say, up to the time when the debt so contracted shall be satisfied by instalments in the shape of subscriptions. He contracts also (which he was competent to do) that he will pay fines if he incurs fines, and in the attornment clause in the deed, which is to take effect only upon his defaulting, he attorns to a rent which would be equal to the payment of the capital and interest which he was to pay monthly in the shape of subscriptions, and also to pay the fines. What is there wrong in that? What does it signify whether the rent is excessive or not? It is a covenant to pay back the mortgage money by certain instalments; and, although it takes the shape of a rent, it does not alter the nature of the transaction.

The matter has been so ransacked of late in several cases that one might reasonably suppose it was conclusively settled. *Ex parte Williams* is a most distinct and emphatic decision that, with whatever words it may be accompanied, however the real

(1) 7 Ch. D. 138.

C. A. 1882 *Ex parte* VOISEY. *In re* KNIGHT. C. J. B.

transaction may be concealed or contrived, if the Court before whom its validity is questioned is satisfied that it was a contrivance to defeat the bankruptcy laws it will not prevail. But that is all it does. In the *Stockton* case, where the matter was gone into at very great length, and where the principles of such like transactions were considered, the learned Judges pointed out that there might be a security upon the chattels that would require a bill of sale. That might be onerous perhaps upon the borrower, perhaps inconvenient even to the lender; and the distinctions are pointed out very plainly.

Instead of taking a bill of sale of the chattels included in the mortgage, the building society contract that, if the borrower shall make default, they shall have a right to enter (one of the defaults being his becoming bankrupt), and whenever they have a right to enter and take that which is left in his possession and control, he shall pay to them a rent, not upon the value of the property, but he shall pay instalments in the shape of subscriptions, fines, and so on, until he is discharged *pro tanto* of the mortgage debt he has contracted. If I were to follow the conclusion of the learned County Court Judge it would seem to be this:—£15,000 being the aggregate amount of three valuers (the Poor Law valuer being one of them), the learned Judge divided the £15,000 by three, and said £5000 was the value of the property.

I have nothing to do with what was the value of the property. I have to carry into effect this contract, which was a valid contract, reasonable and proper, not here made for the first time, but as I believe in frequent practice, the substance of which is, that if default is made in payment, then the relation of landlord and tenant shall subsist, and a rent equivalent to one month's subscription shall be paid in advance.

Then it is said that the addition of the fines to the sum to be paid monthly is invalid. Why is it invalid? Why is a man not to pay fines if he has covenanted to do so, and why should they not be added to the other sum, together with interest, if such be the covenant between the parties? The case is perfectly clear.

It is only necessary to notice one other observation which fell from the counsel for the Respondents, namely, that this is a tenancy at will, to be determined by bankruptcy. No such

principle exists in law as that it is in the power of assignees, who step into the shoes of a bankrupt, to say that the tenancy at will has been put an end to. In my opinion, that is as baseless as the other arguments I have listened to.

I am of opinion that the judgment of the County Court Judge is wrong, that the distresses were valid, and that the building society were, and are, entitled to the benefit of them, and to have paid to them the amount which was put into the bankrupt's hands or *in medio* till the present matter was determined.

The injunction will be dissolved and the Appellants will have their costs here and in the Court below.

J. B. D.

C. A.

From this decision the trustees in the bankruptcy appealed.

The appeal was heard on the 20th of July, 1882.

Winslow, Q.C., *Cookson*, Q.C., and *Mulholland*, for the Appellants:—

This case is governed, not by *In re Stockton Iron Furnace Company* (1), but by *Ex parte Williams* (2), and *Ex parte Jackson* (3). The rent reserved is not a fair one, and the transaction was a sham. It was not intended to create a real relation of landlord and tenant, but only to give the building society an advantage in the event of the bankruptcy of the mortgagor. The tenancy was not to commence until the monthly instalments had been in arrear for three months, and after that the amount of the rent might fluctuate. It would not be a certain rent. The tenancy is also made to commence in the event of the mortgagees being entitled to enter into possession of the property, and they were entitled to do this (*inter alia*) in the event of the bankruptcy of the mortgagor. This shews what was the intention of the attornment clause.

[JESSEL, M.R.:—The words of the attornment clause are large enough, but it does not apply to bankruptcy. The bankrupt could not be a tenant. You must not construe the clause by the one event in which it cannot operate.]

(1) 10 Ch. D. 335. (2) 7 Ch. D. 138.
(3) 14 Ch. D. 725.

C. A.
1882
Ex parte VOISEY.
In re KNIGHT.

The mortgagor would be tenant until a trustee was appointed.

[JESSEL, M.R.:—They did not contemplate a tenancy between the filing of the petition and the appointment of a trustee.]

The moment the tenancy commenced the mortgagees could distrain for arrears. The rent is payable in advance. Would any sane man have accepted a tenancy on these terms?

[JESSEL, M.R.:—The test is not that, but whether the rent is one which an ordinary tenant would have paid.]

Again, the mortgage deed was not executed by the mortgagees, and under the *Statute of Frauds* there would be only a tenancy at will. There must be an agreement to create a tenancy.

[JESSEL, M.R.:—The attornment is evidence of an agreement, If the tenant is in possession this doctrine does not apply.]

Only a tenancy at will was created: *Morton* v. *Woods* (1).

[JESSEL, M.R., referred to *In re Threlfall* (2). The contract is for a monthly tenancy; that is not within the *Statute of Frauds.* I never heard of an attornment clause being executed by the landlord; there is an estoppel: *Ex parte Punnett* (3).]

The tenancy did not commence for three years; consequently, it was only a tenancy at will, and it was terminated by the bankruptcy, and no distress could be levied afterwards. The Respondents distrained on the goods for rent accrued due after the adjudication.

The bankruptcy determined the tenancy. At any rate it is void for uncertainty under the *Statute of Frauds.*

[BRETT, L.J.:—I doubt whether the words "uncertain interest in lands" in sect. 1 of the *Statute of Frauds* apply to tenancies at all. Tenancies are known interests.]

Horton Smith, Q.C., and *J. E. Linklater*, for the Respondents, were not heard.

JESSEL, M.R.:—

This is an appeal from a decision of the Chief Judge that certain distresses issued by the Respondents were valid.

(1) Law Rep. 3 Q. B. 658; 4 Q. B. 293. (2) 16 Ch. D. 274.
(3) 16 Ch. D. 226.

Various points were taken in the argument before us. The chief one was that, by reason of the terms of the mortgage deed, having regard to the annual value of the mortgaged property, there was no *bonâ fide* contract for the creation of the relation of landlord and tenant between the mortgagees and mortgagor, but that it was a mere device and contrivance for giving a preference to the mortgagees in case of the bankruptcy or insolvency of the mortgagor, and that, therefore, the distresses were invalid under the doctrine laid down in *Ex parte Williams* (1) and subsequent cases.

Of course that raises a question of fact. If it never was intended by the parties to create the relation of landlord and tenant, though they used words having that effect, it may be that the relation was not created in law. The evidence upon which the Court came to that conclusion in *Ex parte Williams*, and *Ex parte Jackson* (2), was the absurdity of the amount of the rent reserved, having regard to the real annual value of the mortgaged property. In *Ex parte Williams* a rent of £20,000 a year was reserved for a property which was not worth more than £3000 a year, and the Court came to the conclusion that that was not a genuine rent, or a rent which either party ever intended should be paid, or that the mortgagor should be held to that rent, but that what they did intend was that, in case of the bankruptcy of the mortgagor, the mortgagee should be enabled to distrain, so as to get a preference over the other creditors. In *Ex parte Jackson* the rent was, not seven times the annual value of the property as in *Ex parte Williams*, but fifty-seven times as much, and the Court came to the same conclusion. They did not believe that either party ever intended that a rent of fifty-seven times the value of the property should be paid. The only other case on the subject is the *Stockton Case* (3), in which the contrary was held, though it was by no means clear there that the annual value of the property was equal to the amount of the rent reserved.

In the present case we have to consider, not merely the annual value of the property, but the peculiarity of the security. It is a mortgage to a building society. The monthly payment (leaving

(1) 7 Ch. D. 138. (2) 14 Ch. D. 725.
(3) 10 Ch. D. 335.

C. A. 1882 *Ex parte* VOISEY. *In re* KNIGHT. Jessel, M.R.

out the shillings) was £71. Of course, if default were made, the amount of the monthly payments would be increased by the fines, which would be the penalty for the default, and the monthly payment might therefore be very considerably above £71, but in the ordinary course it would be £71. The property was one of those to which it is very difficult to give any definite value; it was used as a manure manufactory. But we have this evidence (which to my mind is the important evidence as to value) that, before the society lent their money, they had three valuations made of the property, and all of them made it worth more than £12,000. What was the rental value of such a property must, of course, be a mere matter of opinion. It is not an ordinary dwelling-house, or a shop, the value of which depends on the trade carried on there, but some of the valuers say the rent should be such a sum as will pay 7 per cent., and others say 10 per cent., on the value. At 7 per cent. on the amount of the valuations the rent would be about £900 a year; at 10 per cent. it would be about £1200 or £1300 a year. But, taking it at 7 per cent, one may put the rental value at about £900. On the other hand, the Appellants have brought evidence to shew that it is not worth more than £480 a year. However, if you want to try the *bona fides* of the parties in entering into the contract, you must have regard to the valuations which they obtained at the time when they entered into it. It appears to me, therefore, that the rent in this case ought to be taken to be £900 a year. If that is so, it is rather more than twelve times £71. If nothing more than £71 a month had been reserved, it would have amounted to less than that rental, but the fines, no doubt, might increase it very much indeed. But we must consider how the rent is reserved. It was only to commence to be paid when the mortgagor had been in default three months, and it does not at all follow that he would be in default for the whole amount payable; he might have been in default for part only. It would be impossible to say beforehand what the exact figure might be, but I think it would not be fair to test it by the event which actually happened, because the man might go on for five years and then for the first time make default. But what the parties contemplated is, no doubt, this, that after the three months' default the security should be made

available. In this case, although there may be some considerable fines to be paid in respect of the first month, the total annual sum would not be very much increased, and it does not appear to me that for this purpose it is worth considering whether the total rent for the first year would be £100 or £200 above the fair estimated rental. Substantially, it was a rent which a tenant might honestly agree to pay, and which a mortgagee might honestly expect to receive. That being so, and it not being suggested for a moment that the transaction was otherwise than a *bonâ fide* one (indeed there is no evidence whatever that the parties intended that the contract should be different from that which was professed by the deed), it appears to me there was no ground whatever for saying that it was a mere device to enable the society to get a preference in case of the bankruptcy of the mortgagor. On the contrary, I am clearly of opinion that the parties meant that which they have written, viz. that in case of default by the mortgagor the society should have the power of distraining for this sum as rent.

Of course I am quite aware that the stipulation which gave the mortgagees authority to enter, and so entitled them to the benefit of the attornment clause, includes not only the default in payment by the mortgagor, but also his bankruptcy or liquidation. But the attornment clause is expressed only by reference to the clause which gives the right to enter, and it appears to me that the fair meaning of it is that which I have stated, viz., to enable the mortgagees to obtain a good security against the tenant by distraining for the monthly payments if the default should happen, and that it was a genuine agreement to secure that in the shape of rent, and was not intended in any way as a device to escape the operation of the bankrupt law.

This was the point mainly argued. I have not forgotten that the monthly rent would be variable, but I can see no objection to it on that ground. We are all of us familiar with variable rents; I have seen a vast number of them. They are quite common in this country in agricultural districts. There are what are called penal rents for ploughing up pasture. They arise on the ploughing up, and not at any definite time. In those cases the rent is variable, and depends upon the number of acres ploughed up in the

C. A. 1882 *Ex parte* VOISEY. *In re* KNIGHT. Jessel, M.R.

year. Again, we are familiar in *London* and many other large towns with variable rents, especially in building and improving leases, where there are rents varying from year to year, and in gaps and intervals, depending upon the performance of various duties, sometimes by the tenant, sometimes by the landlord, and sometimes by one or the other. The kind of improvement most familiar to us in regard to agricultural leases is drainage. It very often happens that when the landlord does the drainage he puts in a stipulation that he shall receive a certain percentage on what he lays out, and he may be entitled to drain even without the consent of the tenant, and to cause the tenant to pay an increased rent. I do not see the difficulty in law, and therefore I cannot say that, because the rent may vary, not by reason of any duties, but by reason of some default by the mortgagor, there is any objection to it in point of law. It seems to me so far good in law.

But some other points have been taken. It was said that there was no tenancy at all, because you cannot make a tenancy except by agreement, and that, as the mortgage deed was not executed by the mortgagees, there is no agreement. The fallacy of that argument appears to me to be in confounding agreement with evidence of agreement. Certainly there must be an agreement, or else you cannot have a tenancy, but an attornment may be evidence that the landlord has entered into an agreement for a tenancy. In this case we have an attornment to the legal owner by deed executed by the tenant in possession and delivered to the legal owner—very good evidence of a tenancy—evidence, therefore, of an agreement for a tenancy, and, as was said in *Ex parte Punnett* (1), that is an estoppel *in pais* which would prevent the tenant from denying the tenancy. Therefore, there is in this case a well-created tenancy.

Another objection taken was that there is some provision in the *Statute of Frauds* which affects the case. I am not aware of any. It does not appear to me that this is within the statute at all. Indeed, it is not even a lease for years, because we do not know how long it may last, because it may not last for three years or for one year, and it does not appear to me to be obnoxious to the *Statute of Frauds*.

(1) 16 Ch. D. 226.

The last point was this, it was said that upon the terms of the deed it was a mere tenancy at will, and that as regards the subsequent distresses (and there were several), inasmuch as they were levied after the commencement of the bankruptcy, they were void. But the answer to that is this. You must construe a deed according to the words used in it: you can only gather the intention of the parties from the words they use, and here they have not made it a tenancy at will. It is a tenancy from month to month—a monthly tenancy. It may be put an end to, no doubt, by the mortgagees if they think fit, but it is not a tenancy at will. It is a tenancy from month to month, or a monthly tenancy, and, of course, if the trustee in bankruptcy does not choose to disclaim it, he is liable, so long as he remains in possession, to have distresses levied on the property.

In my opinion the appeal fails, and must be dismissed with costs.

BRETT, L.J.:—

The real interest in this case is that it gives the opportunity of considering what was the principle of law laid down in *Ex parte Williams* (1) as compared with *In re Stockton Iron Furnace Company* (2).

Now the stipulation which is called an attornment, if it be a *bonâ fide* and an honest transaction, is a contract in writing between the two parties to it. It is signed by only one of them, if you please, but it is delivered by that person to the other, and kept by him, and the intention of it is that it shall form a contract, and, if that be so, it is a contract. If it is a contract, it is a contract in writing, and, if it be a *bonâ fide* contract and is in writing, the effect of it depends entirely upon the construction of the writing. Now upon that construction it was argued that, if any tenancy is created, it is only a tenancy at will, and that that tenancy at will was put an end to by the bankruptcy, and consequently that some of these distresses were invalid. It was argued, as I understand it, that it must be considered as a tenancy at will, because it seemed to be a tenancy for more than three years, and was therefore void by the *Statute of Frauds*,

(1) 7 Ch. D. 138. (2) 10 Ch. D. 335.

C. A. 1882 *Ex parte* VOISEY. *In re* KNIGHT. Brett, L.J.

because there is no agreement in writing signed by the landlord, and that then the result is that, if a tenancy for more than three years is attempted to be made, it becomes by the *Statute of Frauds* a tenancy at will. It is a sufficient answer to say that this is not a case of a tenancy within the *Statute of Frauds* at all. The 1st section of the *Statute of Frauds* applies only where the tenancy, if good, must of necessity last for more than three years. But if, at the time of the arrangement, the tenancy may last for less than three years, although it may last for more, it is not within that section of the statute at all. And it is obvious that the tenancy in this case, although it may last for more than three years, may last for less.

It was then urged that it was not a good tenancy, because there was no certain rent agreed upon, and it was said that there was no certain rent because the amount of the rent was fluctuating and variable.

Now it is true that, if that which is agreed upon as the payment is uncertain, it is not a rent. It must be certain. But the rent is certain if, by calculation and upon the happening of certain events, it becomes certain, and, as my lord has already said, the mere fact of rent being fluctuating does not make it uncertain. If a lease be made for ten or twenty years, at a rent increasing every two or every three years, there the rent fluctuates, no doubt, but it is not uncertain. It becomes certain as each year advances. And so in other cases. If the rent of a farm for one year, if you please in advance, is to be so much if a certain number of acres are ploughed up; then in the next year a different rent if so many acres are left in pasture or in crops; there the rent is fluctuating, but it becomes certain the moment the condition is fulfilled, and therefore, although a fluctuating, it is a certain rent. If in the present case the agreement had been this, that in case of the non-payment of the instalments by the mortgagor, the rent should be the damage which the other party might suffer, so that it would have to be ascertained at large or by a tribunal, that would be a stipulation for an uncertain payment which could not be rent, and then there would be no lease. But here it seems to me that, upon the happening of the condition named, the rent fixes itself and is therefore a certain rent.

It was also said that upon the terms of the attornment clause itself, without reference to the *Statute of Frauds*, this tenancy would be a tenancy at will, but I agree with my lord that that is not so. It is in terms a tenancy from month to month. Therefore, the objection to the fluctuating nature of the rent not being a valid one, the tenancy not being in its terms a tenancy at will, and not being made a tenancy at will by reason of non-compliance with the *Statute of Frauds*, it was in the hands of the mortgagor a tenancy from month to month. That tenancy passed to the trustees in the bankruptcy, because they did not disclaim it, and therefore all the distresses are good if the transaction be a *bonâ fide* one.

That raises the question whether the contract was a *bonâ fide* one. Now, in what sense can it be said that it is not *bonâ fide?* Whatever may be its terms, and however excessive the rent, it is not a fraud as between the parties, because nothing was concealed by the one from the other, and both agreed to the terms. Therefore it could not be a fraud as between the parties. It was not intended to defraud any known individual. It cannot, therefore, in the ordinary sense of the term, be a fraud at all. The only way in which it can cease to be a *bonâ fide* contract is if it was not intended to be acted upon between the parties at all, and was only a device to evade the bankruptcy laws. That would not be what is ordinarily called a fraud, but it would be what is called a fraud upon the bankruptcy laws, that is, an attempt to evade the bankruptcy laws in case of a bankruptcy. Now that attempted evasion, that want of *bona fides* with regard to the bankruptcy laws, must exist, if at all, at the moment when the contract is made. Therefore, what we have to consider is this (and this is the real meaning of *Ex parte Williams* (1))—at the time when the contract was made was it made for the purpose of its being acted upon between the parties, whether there should be a bankruptcy or not, or, although in terms it appears to be made between the parties with the intention that it should be acted upon whether there is a bankruptcy or not, were their minds really then fixed upon this, that it was to be acted upon only if there should be a bankruptcy? In other words, they must have had bankruptcy in their contemplation at

(1) 7 Ch. D. 138.

C. A. 1882

Ex parte VOISEY. *In re* KNIGHT.

Brett, L.J.

the time of making the contract, they must have contemplated evading or attempting to evade the fair distribution of the mortgagor's property in case of his bankruptcy. That seems to me to be the true proposition, and the true principle of law which is laid down in *Ex parte Williams* (1). Then, when you have got the true principle of law, you have to consider whether the case before you is within that principle in point of fact. Now *Ex parte Williams*, and the other cases on the subject, afford some guidance as to what state of facts will bring a case within the principle, but they do not exclude other states of facts. Other facts may arise which would have the same effect, although they may not be the same as the facts of *Ex parte Williams*. But *Ex parte Williams* and *Ex parte Jackson* (2) shew that, where the rent reserved, or that which is called rent, is so abnormal that you can gather from it alone that the parties must have known and intended that it should not be paid as a rent, that it never could be paid as a rent, or distrained for as a rent (for there never could in ordinary contemplation be anything for which such an absurd amount could be realized) when you find such a state of facts you infer from it (there being nothing to countervail it) that the parties never intended that the stipulation should be acted upon as fixing a rent to be paid by the one or to be distrained for by the other, that it was not a stipulation as to rent at all, but was merely a fiction, and that what was intended was only that, in case of the bankruptcy of the mortgagor, the mortgagee should have the right to seize upon the goods which were then on the premises, not to seize on them if there were no bankruptcy, but only to seize upon them in case of bankruptcy. It seems to me that that is the true meaning of *Ex parte Williams*, because in the *Stockton Case* (3), Lord Justice *James*, who had been a party to deciding *Ex parte Williams*, seeing that words had then been used which might not properly and truly express the principle, that a "fair rent" had been spoken of, changes his proposition and says (4), that the inference is to be drawn, not from what you might call a fair or an unfair rent, but from the rent being of such an absurd amount as to shew that an evasion of the bankruptcy laws was

(1) 7 Ch. D. 138.
(2) 14 Ch. D. 725.
(3) 10 Ch. D. 335.
(4) Ibid. 356.

C. A. 1882 Ex parte VOISEY. In re KNIGHT. Brett, L.J.

intended. It is true that Lord Justice *Baggallay* in the subsequent case of *Ex parte Jackson* (1) did use some expressions which would seem to take the proposition back to the terms used in *Ex parte Williams* (2); but I do not think that he intended to alter the proposition as it was laid down in the *Stockton Case* (3), and certainly the other Judges who sat with him used words which shew that they intended to lay down the proposition, not exactly in the terms used in *Ex parte Williams*, but rather in those which Lord Justice *James* used in the *Stockton Case*, and which have been adopted by the Master of the Rolls and the other Judges who have sat in this Court.

I have already said that *Ex parte Williams* and the other cases, though decided on the ground that the amount of the rent reserved was absurd, do not exclude other means of shewing a want of *bona fides*. For instance, suppose that the amount named as the rent was extremely moderate, but it was proved that there was a secret arrangement that no demand should be made for the rent and no distress should be levied for it, except in the case of the bankruptcy of the mortgagor, that arrangement would equally shew that the supposed tenancy was only a device to avoid a fair distribution of the property of the mortgagor in bankruptcy.

I take it that the question is whether there was a real honest stipulation between the parties, intended to be acted upon whether there should be a bankruptcy or not, or whether it was a stipulation which they intended to be acted upon only for the purpose of defeating the bankruptcy law.

Now, in the present case, considering who were the parties to the transaction (a matter which we ought to consider), that one of them was a building society, and knowing that building societies are apt to impose harsh terms, and that they mean to act upon them and do act upon them, and considering that the amount of the rent reserved, although, if you please, it is large, is certainly not absurdly large, I can see nothing which ought to lead the Court to infer (there is certainly nothing which does in fact lead my mind to infer) that the parties did not mean that the stipulation

(1) 14 Ch. D. 725. (2) 7 Ch. D. 138.
(3) 10 Ch. D. 335.

C. A. 1882

Ex parte Voisey. *In re* Knight.

should be acted upon, whether there was a bankruptcy or not, or that they intended it to be all a sham and to be acted upon only in case of bankruptcy.

It seems to me, therefore, that the judgment of the Chief Judge ought to be affirmed.

Cotton, L.J.:—

The Appellants, who are trustees in bankruptcy, seek to question certain distresses which were put in by the Respondents. I will deal first with the general objection to all of them, which is this, that, having regard to the principles which were acted upon in *Ex parte Williams* (1) and other similar cases, these distresses are bad altogether.

We must consider what the principle of these cases really is, and, as I understand it, it is this. It is undoubted that a mortgagee may enter into a contract with his mortgagor that the mortgagor shall be tenant to the mortgagee, and it is equally undoubted that the law gives certain rights and priorities to a landlord, but the question is whether the contract between the parties was one under which (whatever were the words they used) they really intended to create the relation of landlord and tenant, or whether, under the mask of certain words, they intended, without any real tenancy, to endeavour to give to the mortgagee all those rights which he could have only if he was landlord and the mortgagor was his tenant. This may be put in other words. It may be said the question is whether there was between the parties any real creation of the relation of landlord and tenant, or whether, whatever were the words used, it was all a sham. In considering that question we must look at both the amount of the rent, or what is called the rent, and the other circumstances, and if we find that the so-called rent is so excessive that it never could have been meant to be paid by the occupier to the owner of the land for its use and occupation, that is very strong evidence indeed that there was no real intention to create a tenancy, and if you find that the amount of the so-called rent is so large that, the very moment one payment was made, the relation of landlord and tenant, if it ever existed, must determine,

(1) 7 Ch. D. 138.

C. A.
1882
Ex parte VOISEY.
In re KNIGHT.
Cotton, L.J.

that is almost conclusive against there being any real intention to create the relation of landlord and tenant. That was the case in *Ex parte Jackson* (1), where, the utmost amount to be secured by the mortgage being £8000, the supposed rent was £8000. The very moment that was distrained for, of course, the tenancy would be at an end, because it was to last only while the mortgage debt existed. In that case there could be no doubt that there was a mere nominal creation of the relation of landlord and tenant, or that in reality the intention was to try and get the benefit which a landlord only can have over any other creditor, by using the words landlord and tenant without any intention of creating any such relation.

But in the present case can we come to that conclusion? In my opinion we cannot. First, take the amount of the rent. I will deal presently with the fines. The rent, or the so-called rent is about £800 a year. It is said that is in excess of what, having regard to the poor-rate valuation and the other evidence offered by the Appellants, would have been the rent which any tenant or any mortgagor would have paid. But, in considering what the real intention of the parties was, we must look at what, in their minds, was the value of the property, and we do find that the valuation of the property, made by one valuer who was employed on their entering into the transaction, was about £12,000. And, that being so, the mere fact that the so-called rent was £800 is no argument to shew that there was not a real contract between the parties that, upon the condition of the mortgagees not insisting upon their right to turn out the mortgagor, the mortgagor should pay by way of rent for the use of the land the sum of £800.

But we must also consider this. The mortgage provided that the amount was to be paid off by certain monthly payments extending over a period of fourteen years. Of course they would not necessarily last that time; they might only last for a short time, though they might last for all that time; and the amount of rent stipulated for was not a sum which would enable the mortgagees to obtain at once, without any continuing tenancy, payment of the whole mortgage debt, so that if the power were once put in force it would put an end to the payment of rent by the so-called tenant in possession. That, in my opinion, is an important distinction

(1) 14 Ch. D. 725.

C. A. 1882 *Ex parte* VOISEY. *In re* KNIGHT. Cotton, L.J.

between the present case and the cases which have been cited, and it leads strongly to the conclusion that bankruptcy was not the only thing which was contemplated, there being other cases in which the relation of landlord and tenant would commence and would continue. What the parties contemplated was, not a mere sham or nominal relation of landlord and tenant, in order to obtain payment of the amount due by the mortgagor in the event of his bankruptcy, but the continuance of the relation of landlord and tenant, the tenant paying the monthly rent so long as the mortgage should last, in accordance with the stipulations in the deed as to the payment of the mortgage debt by instalments. In my opinion we could not under these circumstances properly come to the conclusion that it was an attempt to obtain, without any tenancy, a priority in the event of bankruptcy, which could only legally be obtained if there was a tenancy. Of course the question is, was the transaction a sham or a reality? and I think we ought in the present case to take it to be a reality and not a sham. And, if we come to this conclusion, there being nothing to prevent a mortgagee and a mortgagor from agreeing together that the relation of landlord and tenant shall exist between them, we cannot deprive the mortgagee of the consequences resulting from that legal relation which has been honestly and really constituted by the contract between the parties.

But then another objection raised was this, that the tenancy created was only at will, and that therefore the distresses put in after the bankruptcy are void. It is said that the *Statute of Frauds* provides that leases which are not in writing signed by the parties making the same shall operate only as tenancies at will. That, it is true, is the effect of the 1st section of the *Statute of Frauds*, but the 2nd section excepts from the operation of the first leases not exceeding the term of three years. That is to say, tenancies which of necessity exceed three years are within the 1st section, but those which do not of necessity exceed it are not within it. Here the tenancy was to arise only in certain events, which might happen a very short time before the end of the period of fourteen years, when of necessity the mortgage must come to an end, I mean, of necessity according to the contract between the parties. It is not, therefore, in my opinion, liable to any objection under the *Statute of Frauds*, and

there being, putting aside the *Statute of Frauds*, a binding contract between the parties, not for a tenancy at will, but for a monthly tenancy, in my opinion that term vested in the trustees in the bankruptcy, they not having disclaimed it, and the distresses levied after the bankruptcy were good.

There is one other point which I ought to have mentioned before. It was argued by Mr. *Cookson* that the default mentioned in the deed might be a default for any period of time in paying up the fines, and that the result might be to run up the rent to a large and very excessive amount. No doubt that is a question to be considered. But, in my opinion, when we are considering a contract of this nature we ought not to suppose that the parties contemplated abusing it by allowing the instalments to fall into arrear for a considerable time so as to create a very large rent, and thus to subject the mortgagor to a very large increase of payment. But we ought to consider, in the absence of any evidence of such an intention, that the parties intended to act in a reasonable and fair manner in the execution of their contract. That being so, although the first payment of rent for the first three months would be large, yet that would really be only a payment off of arrears, and in my opinion the parties intended to act reasonably in carrying out the contract by securing the payment of the mortgage money by the rent which I have mentioned, £800, and this is not a sum so shocking as to lead to the conclusion that a sham and not a real tenancy was created.

In my opinion the judgment of the Chief Judge was correct, and the appeal must be dismissed.

JESSEL, M.R.:—

I wish to add that I entirely agree in the observations of Lord Justice *Brett* as to the principles of law which are to be extracted from *Ex parte Williams* (1), and the two subsequent cases.

Solicitors for trustees: *Paterson, Snow, & Bloxam*, agents for *Brook & Morris, Liverpool.*

Solicitors for building society: *H. B. Priest*, agent for *J. P. Harris & Gorst, Liverpool.*

(1) 7 Ch. D. 138.

W. L. C.

C. A.
1882
July 21.

POLLOCK *v.* RABBITS.

[1874 P. 183.]

Vendor and Purchaser—Sale by Court—Restrictive Covenant—Qualifying Proviso—Appeal from Form settled by Judge.

In a sale by the Court the particulars of sale contained certain reservations and stipulations as to the property, and one of the conditions of sale provided that the conveyances should contain covenants by the purchasers for securing the liabilities and rights under such reservations and stipulations, the form of such covenants, in case of dispute, to be settled by the Judge.

A dispute having arisen between a purchaser and the vendor concerning the form of the covenant, the Judge settled the covenant, adding a proviso that if the purchaser assigned his purchase, and the assignee entered into a similar covenant, the purchaser should be freed from further liability:—

Held, that the vendor was entitled to an unqualified covenant, and that the proviso must be struck out.

The order of a judge settling the form of a conveyance is subject to appeal.

THIS action was brought for the administration of the estate of Mr. *E. H. Rabbits*, and in the course of the realization of the property a sale by public auction was held, by order of the Court, of some freehold building land at *Sutton*, in lots. The particulars of sale contained certain reservations as to fences and easements and various express stipulations as to the buildings to be erected on the land.

The 12th condition of sale was as follows:—

"The freehold lots are sold subject to the reservations and stipulations mentioned in the particulars, so far as the same affect such lots respectively, and the respective conveyances of such lots shall contain proper reservations and provisions and covenants by the purchasers for the purpose of securing the liabilities and rights under such reservation and stipulations, the form of such reservations, provisions, and covenants, in case of dispute, to be settled by the Judge."

Mr. *Perrin*, the purchaser of one of the lots, sent to the vendor a draft conveyance, which contained a covenant by the purchaser to perform the stipulations comprised in the schedule to the

indenture, following the words of the stipulations in the particulars of sale: and then followed this proviso:—

"But this covenant is not to be held personally binding upon the said *H. Perrin*, his heirs or assigns, except in respect of breaches committed or continued during his or their sole or joint seisin of or title to the land in respect of which such breaches shall have been committed."

The Plaintiff, as vendor, objected to the proposed proviso, insisting on an unqualified covenant, and a summons was taken out before Mr. Justice *Kay*, who held that the covenant should be qualified by a proviso in the following terms:—

"Provided that when and so often as the said *H. Perrin* or his heirs shall sell or dispose of the said lots, &c., or any part thereof, to a purchaser or assign who shall have notice of the aforesaid covenants, and shall take from such purchaser or assign like covenants in the conveyance to him or them, then and in such case the said *H. Perrin* or his heirs so conveying shall be freed from any further liability in respect of a breach of the aforesaid covenants which shall happen after such conveyance with regard to the land so conveyed."

The vendor appealed from this decision.

Barber, Q.C., and *H. Walters Horne*, for the Appellant, contended that the vendor was entitled to an unqualified covenant in compliance with the conditions of sale.

Warmington, for the purchaser:—

The condition provided that the form of the covenant should be settled by the Judge and there is no appeal from his decision. It was not the object of the condition to bind the purchaser personally, but to make the stipulations in the particulars run with the land as far as that could be done.

JESSEL, M.R.:—

I can see no ground whatever for inserting this proviso. The contract between the vendor and purchaser is contained in the

C. A. 1882 POLLOCK v. RABBITS.

12th condition of sale. [His Lordship read the condition.] The form of the covenant was to be settled by the Judge, not the substance of it. The contract was that the purchaser was to covenant to perform the stipulations mentioned in the particulars of sale. There is no bargain that his covenant should cease at any time. If he sells the property he must get an indemnity from the purchaser from him. A proviso limiting the covenant would be contrary to the condition.

With respect to the preliminary objection to the appeal there is no ground for it; a Judge's order is always subject to appeal unless it is expressly forbidden.

The appeal must be allowed with costs.

BRETT, L.J., concurred.

COTTON, L.J.:—

The only question is, what was the contract between the parties? The contract was that the covenant of the purchaser should be the mode of enforcing the stipulation in question; and the proviso proposed to be inserted is quite inconsistent with that contract.

Solicitors: *Pollock & Co.; Armstrong & Lamb.*

M. W.

SHEPARD *v.* JONES.

[1881 S. 1709.]

C. A.
1882
KAY, J.
Feb. 20.
C. A.
July 21.

Mortgage—Mortgagee in Possession—Sale by Mortgagee—Use and Occupation—Permanent Improvements.

If a mortgagee in possession, or a mortgagee selling under his power of sale, has reasonably expended money in permanent works on the property, he is entitled on *primâ facie* evidence to that effect to an inquiry whether the outlay has increased the value of the property, and if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value. And in such case it is immaterial whether the mortgagor had notice of the expenditure.

Notice to the mortgagor is only material when the expenditure is unreasonable, for the purpose of shewing that he acquiesced in it.

Sandon v. *Hooper* (1) commented on.

A mortgagee in possession sold the property under his power of sale, a day being fixed for the completion of the sale and for letting the purchaser into possession. At the request of the purchaser the mortgagee let him into possession four months before the appointed day, but did not require him to pay any rent:—

Held, in an action by the mortgagor for ascertaining the amount of the balance due to him, that the mortgagee could not be charged with an occupation rent for the interval during which the purchaser had been in possession before the appointed day.

Whether in such a case the mortgagee might be charged with wilful default in not requiring a rent from the purchaser, *quære*.

The decision of *Kay*, J., reversed.

By an indenture of transfer of mortgage, dated the 31st of January, 1874, the *Victoria Brewery* and other hereditaments at *Wrexham* were conveyed to the Defendant, *Edward Jones*, for securing £2000, subject to redemption by *Thomas Manby*. By subsequent deeds further sums of money were charged on the same premises.

On the 10th of October, 1878, *Thomas Manby* was adjudicated bankrupt, and the Plaintiffs, *H. Shepard* and *H. Davies*, were appointed trustees of his estate.

On the 18th of February, 1879, the Defendant offered the mortgaged property for sale by auction under the power of sale in his mortgage, but no bidding was made for it. Several persons

(1) 6 Beav. 246; 14 L. J. (Ch.) 120.

C. A. 1882 SHEPARD v. JONES.

also inspected the brewery with a view of purchasing it by private contract, but declined to do so, alleging as their objection to it the inadequate supply and inferior quality of the water in the well on the premises.

In August, 1879, the Defendant took possession of the brewery, which was then vacant, and placed a person in it to take care of it, but did not himself occupy it.

In the early part of the year 1880 the Defendant commenced boring operations to deepen the well, and eventually obtained a good supply of water. The Defendant alleged that this was done with the knowledge and acquiescence of the Plaintiffs.

On the 12th of May, 1880, the Defendant again put up the mortgaged premises for sale by auction, when it was bought by *David Johnson* for £5000, one of the conditions being that the sale should be completed on the 29th of September following. At that time the principal sum of £4000 and a considerable arrear of interest were due to the Defendant.

The Defendant let the purchaser into possession of the brewery soon after the sale without requiring any rent from him, but the purchase was not completed nor the purchase-money paid on the 29th of September.

The purchaser was not a brewer but a manufacturer of zoedone, and used the premises after taking possession as a storehouse for his goods.

The Defendant tendered to the trustees £509 18*s.* 4*d.*, which he considered to be the balance due to them, but they declined to accept it. They claimed in addition rent for use and occupation from the time when the Defendant took possession till the 29th of September, 1880, and they also refused to allow the expense to which the Defendant had been put to in deepening the well, amounting to about £83.

The Plaintiffs then brought this action against the Defendant, claiming the balance of the purchase-money, and asking for accounts against the Defendant as mortgagee in possession. The Defendant paid £544 17*s.* 2*d.* into Court.

At the trial the above-mentioned facts were proved, but there was a conflict of evidence whether the Plaintiffs had notice of and acquiesced in the deepening of the well.

The action was heard before Mr. Justice *Kay* on the 20th of February, 1882.

Rigby, Q.C., and *T. A. Roberts*, for the Plaintiffs.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Defendant.

KAY, J. (after stating the circumstances of the case, and referring to the evidence):—

I have listened carefully to the evidence, and have myself put some questions to the witnesses in order to ascertain if possible whether it was the fact that at the second sale the price was in any respect increased or influenced by the fact of the larger supply of water; but there is no evidence whatever that the price was so increased, and in the absence of that evidence, and as the brewery has been bought by a man who seems to be only using it as a warehouse, I cannot come to the conclusion that he gave more for it in consequence of the boring operations.

The rule of law is quite settled, and has never been altered from what was laid down in the case of *Sandon* v. *Hooper* (1). There Lord *Langdale* states the rule thus: "The next question is whether the Plaintiff is entitled to anything for the improvements which he alleges to have been made. With respect to what a mortgagee in possession may do with the mortgaged property, several cases have occurred at different times shewing what he ought and to some considerable extent what he ought not to do. Such repairs as are necessary for the support of the property he will be allowed for. He will not only be allowed for repairs, but he will be also allowed for doing that which is essential for the protection of the title of the mortgagor. Further if he has got the consent of the mortgagor, or has given him notice in which he acquiesces, then he may be allowed for sums of money which are laid out in increasing the value of the property, but he has no right to lay out money in what he calls increasing the value of the property, which may be done in such a way as to make it utterly impossible for the mortgagor, with his means, ever to redeem; this is what has been termed improving the mortgagor out of his estate, an

(1) 6 Beav. 246, 248.

C. A. 1882 SHEPARD v. JONES. Kay, J.

expression which has been used both in this argument and on former occasions. The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a proper state of repair, and for protecting the title to the property." Now it must be under this last branch of Lord *Langdale's* judgment that the case of the mortgagee must succeed if at all. Had he got the consent of the mortgagor, or given him notice in which he acquiesced? I cannot find that either has been done, but if by any strain of language it were possible to assume that this comes within the case of the mortgagor having had notice in which he acquiesces, then, as Lord *Langdale* says, the mortgagee may be allowed for sums of money which have been laid out in increasing the value of the property; but then the *onus* would be on him to shew that the money was laid out in increasing the value of the property. Now this as it seems to me he has failed to shew. In the first place there is no consent of the mortgagees or trustees in bankruptcy; and in the second place no notice was given in which they acquiesced; and in the third place the mortgagor has failed to shew that what has been done has increased the value of the property. Therefore I am not able to direct an inquiry as to any improvements. I must say that if I had been satisfied that the value of the property had been increased I should have struggled very hard to prevent the mortgagor getting the purchase-moneys which represented the value of the property without allowing for the expenses that occasioned the increase of value; but, as I have said, I have listened attentively to the evidence, and I am not able to see that the mortgagee has proved that there was that increase, or that there was any notice by which the mortgagor can be fixed as acquiescing in these improvements.

Upon the other point the question is whether the mortgagee has been in such occupation of the property as entitles or makes it just for the Court to treat him as liable to an occupation rent. Now, according to a note on the case of *Trulock* v. *Robey* (1), it was thought "advisable to state in a bill to redeem against a mortgagee in possession that the Defendant, and if he is not the original mortgagee, those under whom he claims, have been in the

(1) 15 Sim. 265, 276.

actual occupation of the mortgaged estate as owner or owners thereof, in addition to stating that they have been in possession of the estate, and in receipt of the rents and profits of it, and to pray that the Master may set an occupation rent and include it in his account of rents and profits received." In this case it is proved that the mortgagee himself was not in actual occupation or using the premises, but after he had sold the premises to *Johnson* he let *Johnson* take possession and use them, by storing goods there, and *Johnson* has used them ever since, and is now using them as a warehouse. Then the mortgagee either charged *Johnson* with rent or did not. I understand he did not, but if he allows that state of things *Johnson* must be treated as in possession as his agent, because if *Johnson* had no right to possession under the contract then permission to take possession being given would make him an agent of the mortgagee. If *Johnson* has been in possession and using these premises for his own purposes, and the mortgagee does not choose to charge him rent as he ought to do, then the possession by *Johnson* is the possession of the mortgagee, and if the mortgagee himself had been in possession and using the premises as a warehouse, I could not have the least doubt that he would under the rule be liable to pay occupation rent. Therefore as he chose to let *Johnson* have that possession and use, I must charge him as though he had been himself in possession from the time when *Johnson* took possession. Accordingly I direct the usual account in the redemption suit as against the mortgagee in possession, and I direct the usual inquiry as to what he ought to be charged with as occupation rent from the time that *Johnson* took possession of the estate. I reserve the question of costs.

C. M.

C. A.

From this judgment the Defendant appealed. The appeal was heard on the 21st of July, 1882.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Appellant:—

We appeal from the judgment on two grounds: first, the Defendant is charged with an occupation rent, although he was not in actual occupation of the brewery. No one is liable for an

C. A. 1882 SHEPARD v. JONES.

occupation rent unless he is making use of, or deriving profit from, the premises. In the present case the Defendant put *Johnson* into possession of the brewery before the day named in the conditions of sale in order that the expense of a caretaker might be saved, but he received no rent from *Johnson*.

In the second place, the learned Judge refused to allow the Defendant the expense of deepening the well. There is evidence that this was done with the knowledge and consent of the Plaintiffs. But in truth notice is immaterial if the outlay was for the benefit of the property. In the present case it is clear that the value of the property was increased. It could not be sold until a better supply of water was provided. A mortgagee in possession is always entitled to be allowed for permanent improvements: *Tipton Green Colliery Company* v. *Tipton Moat Colliery Company* (1); *Sandon* v. *Hooper* (2). Mr. Justice *Kay* had only before him the report of the case before the Master of the Rolls. The report on appeal materially modifies the law as there laid down. Lord *Lyndhurst* (3) says that if the value of the property had been increased he would have given the mortgagee the benefit of it.

Rigby, Q.C., and *T. A. Roberts*, for the Plaintiffs:—

With respect to the first point, the occupation of *Johnson* was the occupation of the Defendant. It was the Defendant's duty to require *Johnson* to pay rent for the brewery until the day appointed by the conditions of sale for completion of the purchase. As he did not do so *Johnson* must be treated as his agent or servant. At all events the Plaintiffs are entitled to charge the Defendant with wilful default in not making a profit by the occupation of the premises, which comes to the same thing as an occupation rent.

The deepening of the well did not really raise the value of the brewery. It was the quality, rather than the quantity of the water, that was deficient. In fact *Johnson* did not purchase it for a brewery, but for a place for storing his zoedone. Whether the outlay really improved the property is a question of fact which

(1) 7 Ch. D. 192. (2) 6 Beav. 246; S. C. on appeal, 14 L. J. (Ch.) 120.
(3) 14 L. J. (Ch.) 121.

the Judge decided against the Defendant, and the Court of Appeal ought not to interfere with his conclusion.

JESSEL, M.R.:—

My present opinion is that the Appellant is entitled to succeed on both the points in this case. I have always understood that occupation rent is only charged against a mortgagee who occupies. If one wants authority for that proposition he will find it in the case of *Trulock* v. *Robey* (1). The Vice-Chancellor there says (2): "A man may have been in possession of an estate without being in the occupation of an acre of it. Anyone is in possession of an estate who receives rent from the tenants who do occupy it. Why did not the plaintiff amend her bill by stating that the defendant had been in the occupation of part of the tenements? How can the Court make a decree on a fact that does not appear on the bill?" Therefore the Plaintiffs have to shew that the Defendant, the mortgagee, was in occupation. Of course a man may be in occupation in law by occupying the house himself personally or by an occupation through his servants. In that sense I agree with Mr. *Rigby's* argument that a man need not be in what is called personal occupation, but occupation, like most other things in law, is a complex term, and it is impossible for a man to be in occupation if somebody else is in occupation; that is, excluding the case of joint tenants or tenants in common.

Now in this case the sale by auction was to a purchaser of the name of *Johnson*, and before the time of completion arrived *Johnson* asked the Defendant, the vendor, to let him into possession. I am not going into the question whether he ought to have been let into possession on the terms upon which he was let in. It seems the Defendant had a caretaker for him. Therefore he was in occupation through the caretaker in that sense up to the time that *Johnson* was let into possession. Then *Johnson* was let into possession on the terms of paying a part of the outgoings, as I understand. Whether they were proper terms or not is a question for inquiry. I have heard nothing to shew that they were not proper terms, but upon that I give no opinion, because there is the usual

(1) 15 Sim. 265. (2) 15 Sim. 273.

C. A. 1882 SHEPARD v. JONES. Jessel, M.R.

account directed for wilful default, and if it turns out that he was not let in on proper terms or on reasonable terms, the Defendant may be liable for not getting all he might have got. But in no legal sense was the vendor in occupation after he let the purchaser into occupation. The purchaser was not his servant or his agent, but he was a purchaser entering in his own right and obtaining not only legal possession but legal occupation. It appears to me, therefore, there is no case whatever for charging the Defendant an occupation rent simply because at that time he was not in occupation. That I think is sufficient to dispose of that part of the appeal which relates to the occupation rent.

With regard to the other point, it is one of more general interest. I have always understood the practice to be quite settled. If upon the hearing of a redemption suit the mortgagee, having charged in his pleadings that he has laid out money in lasting improvements, produces general evidence that he has laid out money in lasting improvements—that is, produces evidence of the laying out of the money, and that the works are *primâ facie* improvements—that is sufficient for an inquiry. If he proves more, that is, if he not only proves that he has laid out money in permanent works, but they are really improvements and have improved the property to the extent of the money laid out, he will then get not only an inquiry but an account of the sums laid out in the lasting improvements. But, of course, to get the account he must prove a good deal more than to get an inquiry. Upon that point I will quote some of the words of Lord *Langdale* in the case of *Sandon* v. *Hooper* (1), although *Sandon* v. *Hooper* went too far on another point, and was varied on appeal; but on this point there has been no appeal. Lord *Langdale* says this (2): "Now, in this case it has also to be considered whether it is a matter of course to direct an inquiry whether any money has been laid out in lasting improvements. Many such inquiries have been directed where the fact of any money having been laid out has been proved and brought to the attention of the Court. I quite agree with the argument that has been used on this occasion that it was not necessary for the Defendant to prove the items of sums of money laid out in the permanent improvements alleged to have been

(1) 6 Beav. 246. (2) 6 Beav. 249.

made." Then he goes on: "He may have done something towards the improvement of the estate, and if he had entered into any general proof without going into the items, it is very probable that the proof might have been such as would have induced the Court to direct an inquiry upon the subject." That is, you want general proof of money laid out, and you want general *primâ facie* proof that it has been laid out in lasting improvements. That being so, we have only to consider whether there was in this case proof of both those facts. There was not only general proof, but, as I understand, there was detailed proof as to the money laid out. There is no dispute about that. The money laid out was about £100; but was it proved generally and *primâ facie* to be laid out in lasting improvements? Now it stands in this way; the money was laid out in boring for water. That was not at first productive, and then they laid out more money which was productive, and the quantity of water was largely increased. Whether or not that was an increase which added much to the saleable value of the property would be a matter for inquiry, but they did satisfy the two things laid down by Lord *Langdale*, namely, that they laid out money, and that the money was *primâ facie* a lasting or permanent improvement. It was lasting and permanent, and it was *primâ facie* an improvement; because it very much increased the quantity of the water in the well, whether we look on it as a brewery property or even as a property not used as a brewery, because it appears that a supply from the water company was no longer required. I think there is sufficient for inquiry even if there were no special circumstances in this case to distinguish it from the ordinary redemption suit. Of course, a mortgagee takes the inquiry at his own risk, as to what may be the result of the inquiry.

But there are very special circumstances in this case which I think distinguish it from an ordinary redemption suit, which puts the right of the mortgagee to the inquiry upon higher grounds. This is not a redemption suit at all. It is a suit brought by the mortgagor for an account from the mortgagee who has exercised his power of sale of the application of the proceeds of that sale and a claim for the balance. If it should turn out that the mortgagee has done something to the property at his own expense

C. A. 1882 SHEPARD v. JONES. Jessel, M.R.

which increased its saleable value, I think it is plain on ordinary principles of justice, that that increase should not go into the pocket of the mortgagor without his paying the sum of money which caused the increase. It distinguishes it from the ordinary case of improvements. The increase may have been an increase which did not come under that denomination, but which increased the selling-price. It seems to me that wherever there is a case of that kind where the mortgagee can prove that the selling-price was increased by reason of the outlay, then to the extent to which that selling-price has been so increased the mortgagor cannot get the benefit of it without paying for the outlay. Of course the mortgagor could not be made to pay more than the increase; but to that extent it seems to me in ordinary justice the mortgagee is entitled to say, "You shall not get that increased benefit caused by my outlay without paying for that outlay."

In this case it seems that this property was a brewery. It seems also from the evidence that the supply of water was deficient both in quantity and quality, that there was an abortive sale, which was abortive by reason, to some extent at all events, of the defective supply of water, and that thereupon after the abortive sale the mortgagee set to work to supply the deficiency. There is a dispute whether he did supply it altogether. It is said that although he supplied it as regards quantity, he did not do so as regards quality. Then there was a second sale, at which the property sold for a good price, but the purchaser was not a brewer, and it is suggested that the purchaser would have given the same money for the property whether there had been this increase in the supply of water or not. Well, that may be so, but it does not at all follow that the selling value was not increased. It was a sale by auction. A brewer may have attended the sale, or several brewers may have done so, and they may have bid up to the last bidding before that which was bid for by the purchaser, because there was a good supply of water, and it was suitable for brewery purposes. If that was so, the price would be increased by reason of the additional supply of water, although the actual final purchaser did not want the water at all. That does not prove it. All I can say is, that there being in my opinion a *primâ facie* case that the property was increased in value, it is fair that

there should be an inquiry to ascertain whether it was so increased. Of course that inquiry will be whether any and what sum ought to be allowed in taking the accounts of the Defendant by reason of lasting improvements, and that will leave the whole case open.

There is another observation I wish to make on the supposed necessity of notice, and there are some words in the judgment of Lord *Langdale* in *Sandon* v. *Hooper* (1), which I have always declined to read literally, and which do not appear to me to be warranted by the judgment of Lord *Lyndhurst*. That is, as to notice. I am by no means prepared to say that Lord *Langdale* did not mean exactly what I am going to say: I rather think he did; but it was imperfectly expressed either by himself or by the reporter. As I understand it, notice is not necessary if the improvement is a reasonable one, and produces a benefit. The mortgagee cannot be deprived of that benefit because he did not tell the mortgagor of it. If on the other hand it is an unreasonable one, and produces no advantage, I do not see why the mortgagor should be charged with it because the mortgagee gives him notice of it. He could not prevent it, the mortgagee being in possession. That being so it seems to me that the real doctrine as to notice is, that where the mortgagee gives the mortgagor notice of the expenditure, and the mortgagor agrees to it, then of course it is unnecessary for the mortgagee to shew that the expenditure was reasonable. It is a contract. If the mortgagor does not actually agree to it, but does such acts as in the view of a Court of law amount to tacit consent, or, as it is sometimes called, "acquiescence," that will also put the mortgagee in an equally advantageous position. But if the mortgagor simply does nothing, it appears to me that notice cannot affect the rights of the parties either way.

I think that is the true explanation of what was intended by Lord *Langdale* in *Sandon* v. *Hooper*, and I think that is the real view of the law on the subject.

Under these circumstances I think the appeal must be allowed. As regards the costs there is an ample fund, and you can add the costs to the mortgagee's costs of this suit.

(1) 6 Beav. 246.

C. A. 1882 SHEPARD v. JONES.

BRETT, L.J. :—

In this case two objections have been taken to the order of Mr. Justice *Kay*. The first is, that besides ordering an inquiry as to wilful default, he has made a specific order for a charge against the Defendant for an occupation rent. In order to justify that charge I do not understand that anybody alleged that there must not be an occupation by the mortgagee. In order to charge a person with an occupation rent, nobody denied that it must be shewn that he occupied, as distinguished from being a mere legal possessor. But it seemed to me in the course of the argument that it required considerable patience and attention to obtain the facts of this case with regard to Mr. *Johnson* to see whether his occupation was or was not the occupation of the Defendant, and it was not until after having been enabled to hear all that Mr. *Rigby* thought it right to say on the subject that I considered myself in a position to say whether the occupation of Mr. *Johnson* in this case was or was not the occupation of the Defendant. It cannot be the occupation of the Defendant unless Mr. *Johnson* was put there in possession, with the same relation to the Defendant as if he had been a servant. It is not sufficient to shew that Mr. *Johnson* was in there as a purchaser let in too early. It was not sufficient to shew that he was let in merely as a licensee. It was necessary to shew that he was let in under such circumstances as would make his relation to the Defendant that of a servant. But it seemed to me that it required, and I am still of opinion that it required, some attention to the facts of this case, and to have them really disclosed to the Court, before one could tell what the position of Mr. *Johnson* was with regard to the Defendant. After having heard and attended to Mr. *Rigby*, I am of opinion that he failed to shew that the occupation of *Johnson* was the occupation of the Defendant. If that is so, the express order to charge the Defendant for occupation rent cannot be supported.

Another objection was the refusal of the learned Judge to allow an inquiry as to an alleged expenditure by the Defendant on the property. Now in order to justify such an inquiry it seems to me that the Defendant was bound to shew before the learned Judge some *primâ facie* evidence that he had incurred

an expenditure; and, secondly, some *primâ facie* evidence that that expenditure was incurred for a matter which, *primâ facie*, might be an improvement of the property; and, thirdly, some *primâ facie* evidence that such an improvement would be a lasting improvement; and, fourthly, *primâ facie* evidence that such expenditure was a reasonable expenditure. It seems to me that he must give *primâ facie* evidence before the Judge of all those four matters before he would be entitled to an inquiry. If he does give *primâ facie* evidence of all those elements, then it seems to me that the question of notice does not arise. I do not think that notice alone can be of any importance as to either head of this question of expenditure.

Now, here the Defendant did give evidence of expenditure. That is not denied. It seems to me that an expenditure in deepening a well on business premises, whatever be the business, is *primâ facie* evidence of an improvement, and it is equally evidence of a lasting improvement; and unless it is clearly proved to the Court that the expenditure has been done in a mode which would make it wholly unreasonable, it seems to me *primâ facie* evidence also that it is a reasonable expenditure. Therefore I think in this case the Defendant was entitled to the inquiry wholly irrespective of any question of notice at all. It seems to me that the only way in which notice comes to be material is where it may be fairly alleged that the expenditure is not reasonable. Nevertheless if notice of what is going to be done be given to the mortgagor, and he has acquiesced in it, then the question of whether the expenditure was for a reasonable or unreasonable purpose falls to the ground.

Now, having heard the judgment of Lord *Langdale* in *Sandon* v. *Hooper* (1) read, and interpreting that judgment, as I think, in justice to every Judge, it is necessary to interpret what he says in giving judgment, namely, interpreting his language with reference to the facts before him on the particular case; I think that what Lord *Langdale* meant to say, and what on the proper interpretation of his language he did say, was that where there is evidence of a reasonable and lasting expenditure for an improvement no notice at all is necessary, but that if there be a doubt as to

(1) 6 Beav. 246.

C. A. 1882 SHEPARD v. JONES. Jessel, M.R.

whether the expenditure was reasonable or not, then evidence of notice and acquiescence takes away the consideration of the question whether the expenditure was for a reasonable purpose.

It seems to me that, considering his language according to the facts that were before him, that is what he meant to say, and upon a fair interpretation of his language that is what he did say.

COTTON, L.J.:—

The question here is whether the Defendant, the mortgagee, ought to have been declared entitled to an inquiry as to the expenditure incurred by him, which he says was an improvement to the property. Undoubtedly, a mortgagee has no right as against a mortgagor to improve the mortgagor out of his property, and if he lays out a very large sum that is in itself a thing which he has no right to do. A mortgagor must not be prevented from redeeming by the mortgagee when in possession throwing a great burden upon him.

We have not to consider any such objection in the present case. This property has been put up for sale by the mortgagee, there being no prospect of redemption in the sense of payment off of the mortgage money; there was difficulty in the first sale, and certainly in one sense a probable bidder was deterred from making a bid or becoming a purchaser by the deficiency of the water supply. That was probably a deficiency in quality as well as in quantity. Then, with the intention of putting it up again for sale, the mortgagee bores and increases the water supply, and then it is put up again and it is sold. Now upon this evidence I think there is at least a *primâ facie* case that what was done increased the saleable value of the property. Even although the quality of the water might not be improved, yet an addition to the production of the well, especially if the property is to be used as a brewery, would *primâ facie* be an addition to the value, and be a matter that would encourage persons to come and bid. In a case of this sort, where there has been no alteration in the nature of the property, which a mortgagee must not make, but merely an expenditure *primâ facie* increasing the saleable value of the estate for the purpose for which it was intended, it is in my

opinion, if it can be shewn that there has been an increase in the saleable value of the estate, an expenditure which the mortgagee is entitled to have repaid to him as a reasonable expenditure. It is a matter which reasonably might be done for the purpose of improving the actual state of the property, not an alteration, but improving it for the purpose of carrying out the object of the mortgagee, namely, to realize it by a sale. That being so, I have not anything to say about what might happen in any other case. But here in my opinion the mortgagee has made out a *primâ facie* case that his expenditure was reasonable in amount, and reasonable with reference to the existing purposes of the property, and such as to entitle him to an inquiry by shewing *primâ facie* that he increased the value of the estate for the purpose of the sale.

In my opinion, therefore, there ought to be the inquiry suggested by the Master of the Rolls, which, of course, will be at the risk of the mortgagee, who if his *primâ facie* case breaks down, and he does not establish that the saleable value of the estate has been increased by his expenditure, will have to pay the costs of the inquiry. I think he has made out a *primâ facie* case. He will be entitled to his expenditure so far as it has increased the saleable value of the property, but of course not to more than he has expended.

The other point is a short one. The mortgagee complains that he has been charged with an occupation rent during a period of time intervening between his sale and the time fixed for the completion of the purchase. How was he in occupation? It is obvious that you cannot charge a man with an occupation rent, unless he is in occupation. He was not actually in occupation either by himself or by any servant of his; but it is said that he is to be considered as in occupation, because without any right under the contract the purchaser, with his permission and assent, took possession of the premises. In my opinion, that occupation of the purchaser can in no sense be considered in law the occupation of the mortgagee, the vendor, so as to charge him with an occupation rent. If anything is to be charged, it would be for wilful default. I do not enter into that, and I give no countenance to the suggestion that there was wilful default. I have heard no evidence which shews there has been wilful default.

C. A. 1882 SHEPARD v. JONES. Cotton, L.J.

What we have to consider is whether an occupation rent can be charged during that period. In my opinion this purchaser was in possession as purchaser, and not in such a way as to make his occupation that of the Defendant, either as mortgagee or vendor. Under those circumstances the mortgagee, whatever else, if anything, he may be liable for during that period, cannot, in my opinion, properly be charged with an occupation rent.

Solicitors for the Plaintiffs: *Field, Roscoe, & Co.*, agents for *Evan & Moores, Wrexham.*

Solicitors for Defendant: *Abbott, Jenkins, & Co.*, agents for *Lewis & Son, Wrexham.*

M. W.

C. A. 1882 V.-C. H. *March* 15. C. A. *July* 21.

KIRK *v.* TODD.

[1880 K. 029.]

Practice—Action for Damages and Injunction on a Tort by Testator—Continuance of Action against Executors—Actio personalis moritur cum personâ— 3 & 4 *Will.* 4, *c.* 42, *s.* 2 [*Revised Ed. Statutes, vol. vii. p.* 409]*—Death of sole Defendant trading under Name of Firm—Executors carrying on Trade under same Firm—Rules of Court,* 1875, *Order* XII., *r.* 12*a*; *Order* L.

24 Ch D 442 443, 450 463.

The Plaintiff brought his action for damages and an injunction against the firm of *T. & Co.* for torts committed by the firm. The firm consisted of *T.* alone, who died more than six months after the commencement of action, and the action was continued against his executors:—

Held (affirming the decision of *Hall*, V.C.), that *T.* having died more than six months after the commission of the acts complained of, no action either for damages or injunction could be maintained against his executors; although the action had been commenced in the lifetime of the testator, and although the executors continued the business in the name of the firm.

THIS was an action by *Joseph Moxon Kirk & Sons*, the owners of certain dye-works on the *Ovenden Brook*, near *Halifax*, against *John Todd & Sons*, who carried on the business of woolcombers at a mill adjoining the brook and a short distance above the Plaintiffs' premises, for an injunction to restrain the Defendants from fouling and polluting the *Ovenden Brook*, and for damages.

The writ was issued on the 7th of April, 1880, at which time the business of *John Todd & Sons* was carried on by Mr. *Matthew*

Todd alone, and he duly appeared in his own name in accordance with the Rules of Court, 1875, Order XII., rule 12a.

Statements of claim and defence were filed in the names of the Plaintiffs' and Defendants' firms respectively, and the reply was delivered on the 5th of March, 1881. On the 20th of May, 1881, notice of trial was given, and on the 11th of June, 1881, Mr. *Matthew Todd* died. On the 14th of September, 1881, his will was proved by *Henry Moseley* and *John Todd*, his executors; and on the 3rd of November, 1881, the Plaintiffs obtained under Order L., rule 4, an order that the further proceedings in the action should be carried on by the Plaintiffs against Messrs. *Moseley & Todd* as the legal personal representatives of the late Defendant *Matthew Todd*.

The action came on for trial before Vice-Chancellor *Hall* on the 15th of March, 1882, and counsel for the Plaintiffs were proceeding to open their case when a preliminary objection was taken by the counsel for the Defendants.

W. Pearson, Q.C., and *Leonard Field*, for the Defendants:—

This action would have come to an end upon the death of *Matthew Todd* but for 3 & 4 Will. 4, c. 42, the 2nd section of which enacts that an action of trespass or trespass on the case may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect of his property real or personal, so as such injury shall have been committed within six months before such person's death, and be brought within six months after such executors or administrators shall have taken upon themselves administration. Now the wrong in this case must be taken to have been committed prior to or at the time of the issue of the writ, for the damages must be confined to damages incurred up to the date when the writ was issued: *Original Hartlepool Collieries Company* v. *Gibb* (1). And the writ was issued on the 7th of April, 1880, more than six months before the death of Mr. *Matthew Todd* on the 11th of June, 1881.

Again, the Plaintiffs cannot obtain any injunction against the present Defendants Messrs. *Moseley & J. Todd* on account of acts

(1) 5 Ch. D. 713.

C. A. 1882 KIRK v. TODD.

done by their testator. They might, no doubt, be sued for an injunction in respect of a wrong done by themselves, but they cannot be so sued in a representative character: *Attorney-General* v. *Birmingham, Tame and Rea Drainage Board* (1); *Attorney-General* v. *Guardians of Poor of Dorking* (2). The action must therefore be dismissed.

Hastings, Q.C., and *Terrell*, for the Plaintiffs:—

The objection is founded on a misapprehension of Order L., which provides that on death, marriage, or bankruptcy, if the cause of action survive or continue, the action shall not become abated, and provides for the continuance of the action against personal representatives, and for carrying on the proceedings when there has been a transmission of interest or liability. Here the action was brought against "*John Todd & Sons*" in respect of acts done by "*John Todd & Sons*"; their defence is the defence of "*John Todd & Sons*," and the action is between the two firms who are Plaintiffs and Defendants. What individuals form those firms is immaterial. The present Defendants are carrying on their business under the firm of "*John Todd & Sons*," and are continuing precisely the same wrong, *i.e.*, the pollution of the stream. There was no abatement, the cause of action both survived and continued; all that was necessary, therefore, was to bring the new Defendants before the Court by the usual order. Moreover, the Defendants cannot take this objection while the order to carry on the proceedings against them is in force. If that order was improperly obtained, they should have moved to discharge it. The two cases cited were cases not of death, marriage, or bankruptcy, but of an entirely new title arising by the creation of a new board; and here the acts of pollution were continued up to the death of the testator, while the order to continue the proceedings was obtained within six months after these Defendants had proved the will.

W. Pearson, in reply:—

By Order XVI., rule 10a, any person carrying on business in

(1) 17 Ch. D. 685. (2) 20 Ch. D. 595.

C. A. 1882 KIRK v. TODD.

the name of a firm apparently consisting of more than one person may be sued in the name of such firm; and by Order XII., rule 12a, such person shall appear in his own name, but all subsequent proceedings shall nevertheless continue in the name of the firm. Here *Matthew Todd* was sued in the name which he had assumed of *John Todd & Sons*, and he appeared individually as the only person carrying on that business. It is not a case in which a corporation are sued; and when Order L. speaks of a cause of action surviving or continuing, it must mean surviving or continuing with regard to the original Defendant, and here the cause of action neither survived nor continued as to *Matthew Todd*.

HALL, V.C.:—

It appears to me that as regards the injunction which is asked for, the objection is fatal, and must prevail, the injunction being in its nature a remedy against an individual, I am unable to restrain the executors in respect of acts done by their deceased testator, the acts not being continuing acts in the statutory sense. As to the damages, the action was commenced in April, 1880, and the testator died in June, 1881, far more than six months after the date of the writ, up to which time the acts complained of continued. Supposing no action had been commenced against *Matthew Todd*, then his executors could only have been sued for acts done within the six months preceding his death. Under the circumstances I do not think it was competent to the Plaintiffs to obtain an order to continue the proceedings after the expiration of six months from the date of the writ, so as to give the proceedings the effect of a new action. By the statute the remedy is only granted within a fixed period, and here the order was too late. I hold that the objection must prevail. The action must be dismissed, and the Defendants will have their costs from the time of their being served with the order of the 3rd of November, 1881.

W. W. K.

C. A.

From this decision the Plaintiffs appealed.

The appeal was heard on the 21st of July, 1882.

C. A. 1882 KIRK v. TODD.

Terrell (*Hastings*, Q.C., with him), for the Appellants:—

The maxim of the Common Law that *actio personalis moritur cum personâ* does not apply to this case. The maxim has reference to the substance of the action, not to the form. The substantial question is whether the injury was to the person of the party injured or to his estate. If it was to his person the right of action dies with the death of either party; if it be to his estate the executors may sue or be sued on it, whether the action lies in tort or contract. In the present case not only has the Plaintiff's estate suffered injury, but the Defendant's estate has been the gainer by the acts done, and the Plaintiff is entitled to damages against the executors of the defendant: *Twycross* v. *Grant* (1); *Hambly* v. *Trott* (2); *Bradshaw* v. *Lancashire and Yorkshire Railway Company* (3); *Wms. Saund.* (4).

But assuming that the maxim would apply to this case, we are within the equity of the statute 3 & 4 Will. 4, c. 42, even if we are not within the letter; for the action was commenced in the testator's lifetime; the proceedings against the executors are not under the present practice a revival but a continuance of the action. Even if we are not entitled to damages we are entitled to an injunction against the Defendants under *Lord Cairns' Act*. The action ought not to have been dismissed with costs. The executors ought to have moved to discharge the order making them parties, and so have saved the expense of going to trial.

W. Pearson, Q.C., and *Leonard Field*, for the Defendants, the executors, were not called on.

JESSEL, M.R.:—

I cannot help feeling that this is a very hard case, and that no doubt is the reason why the appeal was brought, but we must not allow hard cases to make bad law. The Plaintiffs sued the original Defendant for damages and an injunction. It was an action on a simple tort. It did not appear that the Defendant had got any benefit by fouling the Plaintiff's stream; he had only injured the Plaintiff. As I understand the rule at Common Law it was this—

(1) 4 C. P. D. 40.
(2) Cowp. 371.
(3) Law Rep. 10 C. P. 189.
(4) Page 217 b.

you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages. That rule has never been altered except by the Act 3 & 4 Will. 4, c. 42, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here; therefore the statute did not apply, and the rule of the Common Law remained in its simplicity. Consequently the Vice-Chancellor had no option but to dismiss the action, and I cannot say he was wrong in the discretion which he exercised as to the costs. I do not profess to understand why the limitation of six months was imposed by the Legislature, but we find it in the statute and we cannot alter it. The appeal must be dismissed with costs.

BRETT, L.J., concurred.

COTTON, L.J.:—

It may or may not be right for the Legislature to interfere with the present state of the law, but in my opinion we should be acting contrary to the law if we were to allow this appeal.

Solicitors: *Pitman & Son*, agents for *Booth, Clough, & Booth, Leeds; J. W. Sykes*, for *Moseley, Huddersfield.*

M. W.

C. A. 1882 July 22.

LONDON AND COUNTY BANKING COMPANY *v.* LEWIS.

[1882 L. 1896.]

Practice—Injunction—Protection of Property—Equitable Mortgage—Ex parte Injunction to restrain parting with Legal Estate.

In an action by an equitable mortgagee for sale or foreclosure the Court granted an interim injunction to restrain dealing with the legal estate till the next motion day, on an *ex parte* application by the Plaintiff; there being ground for believing that the Defendants intended to part with the legal estate *pendente lite*.

THE Defendant, *George A. Lewis*, on several occasions between 1852 and 1882 deposited the title deeds of his freehold property with the Plaintiff company to secure advances to him, and by a written memorandum on each occasion engaged whenever called on to execute a proper conveyance thereof to such persons as they might direct. A large sum was still due on these securities.

In the month of July, 1882, the Plaintiffs were informed by the solicitor of *G. A. Lewis* that the Defendants *George Lewis* and *Gilbert Lewis*, the sons of *G. A. Lewis*, claimed to be interested in the hereditaments comprised in the deposits under certain voluntary conveyances.

The Plaintiffs then applied to the two younger Defendants to concur in an arrangement whereby their interests, if any, in the said property should be expressly made subject to the securities held by the Plaintiffs, but they declined to do so.

The Plaintiffs, on the 12th of July, 1882, commenced an action against *G. A. Lewis* and his two sons asking for foreclosure or sale of the freehold property, a declaration that the interests of the Defendants *George Lewis* and *Gilbert Lewis* were subject to the memorandum of deposit, and an injunction to restrain the Defendants from parting with or disposing of the legal estate in the premises.

On the 22nd of July, the Plaintiffs moved *ex parte* before Mr. Justice *Kay* for an injunction until the next motion day in the terms of the claim in the action. The application was supported by an affidavit by the manager of the Plaintiffs' bank, in which

he deposed to the facts stated above, and also that he apprehended that the Defendants *George Lewis* and *Gilbert Lewis* were about to dispose of and convey the legal estate in the hereditaments comprised in the said voluntary conveyances.

Mr. Justice *Kay* having refused this application, considering that the existence of a *lis pendens* was sufficient protection to the Plaintiffs, the Plaintiffs renewed the application before the Court of Appeal.

Russell Roberts, in support of the application:—

The existence of a *lis pendens* is not an adequate protection to the Plaintiffs. The Court has often interfered in this manner when there have been adequate grounds of apprehension: *Spiller* v. *Spiller* (1); *Hadley* v. *London Bank of Scotland* (2); *Dart's* Vendors and Purchasers (3).

JESSEL, M.R.:—

I think that on the authority of *Spiller* v. *Spiller* we may grant the application. The Plaintiffs are entitled to call for a conveyance of the real estate, and for the concurrence of the Defendants, *George* and *Gilbert Lewis*. They have declined to enter into any arrangement with the Plaintiffs, and it is therefore probable that they intend to do something improper with the legal estate. The Plaintiffs must give an undertaking as to damages.

BRETT and COTTON, L.JJ., concurred (4).

Solicitors: *Harries, Wilkinson, & Raikes.*

(1) 3 Sw. 556.
(2) 3 D. J. & S. 63.
(3) 5th Ed. p. 1094.
(4) On the next motion day Mr. Justice *Kay* continued the injunction till the hearing.

M. W.

C. A.
1882
V.-C. H.
March 21, 22.
C. A
July 24, 25.

In re ANGLO-FRENCH CO-OPERATIVE SOCIETY. *Ex parte* PELLY.

Company—Misappropriation of Funds by Directors—Repayment by Directors—Investment of Money misappropriated in Debentures of the Company—Set-off by Director—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 101, 165 [*Revised Ed. Statutes, vol. xiv., pp.* 225, 238].

The directors of a company passed a resolution to pay £3000 to *P.*, who was one of the promoters, for services rendered, upon an understanding, which was not reduced into writing, that he should expend £400 in advertisements and advance the residue to the company on the security of debentures. The directors accordingly paid *P.* the money, and he spent £400 as arranged, and advanced the remaining £2600 to the company on debentures, which he divided between himself and certain of the directors. The company was afterwards wound up:—

Held (affirming the decision of *Hall*, V.C.), that the directors were jointly and severally liable to repay the £2600 to the company; that the advance of the money to the company on debentures was not a repayment to the company; and that it made no difference whether the arrangement to invest the money in debentures under which it was originally paid to *P.* was binding or not.

At the time of the winding-up the company was indebted to one of the directors who were thus held liable, for money advanced for expenses:—

Held, that he could not set off the debt against his liability for the misappropriation of the company's money.

Coventry and Dixon's Case (1) commented on.

THE *Anglo-French Co-operative Society, Limited*, was incorporated in May, 1878, for the purpose of carrying on the business of a co-operative store.

On the 22nd of May, 1878, the directors, who were then Captain *R. W. Pelly*, Colonel *Colman*, Major *Stephens*, Mr. *Barrow*, and Mr. *Pearse*, entered into an agreement with Mr. *A. Pulbrook*, a solicitor, who was a promoter of the company, by which it was agreed that *Pulbrook* should provide such sums of money as he in his sole discretion should consider necessary or expedient for the purpose of obtaining the subscription of the debentures to be issued by the company; and that in consideration thereof the company should on the day of the first allotment of debentures pay to Mr. *Pulbrook* £3000 in full discharge of all the preliminary

(1) 14 Ch. D. 660.

expenses of obtaining the subscription of the debentures up to the date of the allotment, including advertisements, printing, commission, or otherwise.

Captain *Pelly* was not present at the meeting of the 22nd of May when this agreement was sanctioned, but he was chairman at the next meeting on the 6th of June, when the minutes were read over and signed by him as chairman.

Colonel *Colman* was not present at the meeting of the 22nd of May.

At this meeting of the 6th of June debentures were allotted to Captain *Pelly* and to some of the other directors; and it appeared from the evidence that a discussion arose as to the issue of the debentures, when it was arranged that Mr. *Pulbrook* should, out of the sum of £3000, when paid to him, expend a further sum of £400 in advertising the debentures, and should apply the remaining £2600 in taking debentures to that amount. But this agreement was not reduced into writing; nor was there any entry of it on the minutes.

On the 1st of August, 1878, another meeting of the directors was held, at which a cheque was drawn and signed by Captain *Pelly* and Mr. *Pearse* for £3000 in favour of Mr. *Pulbrook*.

Mr. *Pulbrook* expended £400 in advertising the debentures, and paid the whole of the remaining £2600 to the company for debentures, which were allotted as follows:—Mr. *Pulbrook* £860, Mr. *Lever* £860, Mr. *Pearse* £200, Colonel *Colman* £200, Mr. *Barrow* £230, Mr. *Stephens* £150, and Mr. *Wisdom* (the secretary) £100. It was alleged that these gentlemen received some of Mr. *Pulbrook's* shares for services rendered by them to the company.

The company was afterwards wound up under a winding-up order, and the official liquidator took out a summons before Vice-Chancellor *Hall* for a declaration that Captain *Pelly*, Colonel *Colman*, Major *Stephens*, Mr. *Pearse*, and Mr. *Barrow*, were jointly and severally liable to repay the sum of £2600 misapplied by them out of the funds of the society.

Captain *Pelly*, in addition to his general defence to the claim of the official liquidator, claimed a set-off of £331, for moneys advanced by him to the company.

C. A. 1882

In re Anglo-French Co-operative Society. *Ex parte* Pelly.

The summons came on to be heard before Vice-Chancellor *Hall* on the 21st of March, 1882.

Hastings, Q.C., and *A. Young*, for the official liquidator in support of the summons:—

There was a misapplication by these gentlemen of the moneys of the company, and they are jointly and severally liable to repay to the company the moneys so misapplied: *In re Englefield Colliery Company* (1). There was no binding agreement that the money should be invested in debentures of the company. It was a mere expectation of investment. And if there was a binding agreement it made no difference. The advance to the company of the money misapplied was not a repayment to the company. The breach of trust was complete when the money was taken out of the society's coffers, and it has never been made good. The directors' liability is unaffected by the existence of a chance or even a probability that the money may come back to the company in some other shape.

W. Pearson, Q.C., and *Northmore Lawrence*, for Captain *Pelly*:—

The money paid to Captain *Pelly* has been paid back into the coffers of the company, by being invested in debentures according to the agreement between the parties. At all events, Captain *Pelly* is entitled to a set-off for moneys actually due to him from the company: *Buckley* on Joint Stock Companies (2); *Coventry and Dixon's Case* (3).

Buckley, for Mr. *Pearse*.

Grosvenor Woods, for Major *Stephens*, cited *British and American Telegraph Company* v. *Albion Bank* (4); *Gray* v. *Lewis* (5); *In re British Seamless Paper Box Company* (6); *Ex parte Cooper* (7); *Hodson* v. *Tea Company* (8).

Hastings, in reply:—

There can be no set-off in this case. The debt due from the

(1) 8 Ch. D. 388.
(2) 2nd Ed. p. 323.
(3) 14 Ch. D. 660.
(4) Law Rep. 7 Ex. 119.
(5) Law Rep. 8 Ch. 1035, 1052.
(6) 17 Ch. D. 467.
(7) Law Rep. 10 Ch. 510.
(8) 14 Ch. D. 859.

company to the individual only enables him to obtain a dividend; that due to the company is distributable for the benefit of the general creditors and of the shareholders as well if the company turns out to be solvent: *In re Whitehouse & Co.* (1); *Hay's Case* (2).

HALL, V.C.:—

Captain *Pelly* by his statement of defence alleges that the company was indebted to him in the sum of £331 for moneys advanced by him for the purpose of enabling the society to carry on its business, which sum he claims to set off, but I cannot allow that claim, because, in my opinion, there is no such proof as to enable him to maintain a claim for a set-off in respect of that sum.

As regards the liability of Colonel *Colman* as to the £2600 or the £400, he was not present when the resolution was come to to pay the £3000; he was no party to that proceeding, nor to the drawing of the cheque for that sum. He was not a director up to the time when an actual and formal appointment of directors was made at the meeting on the 22nd May, and it appears to me that as he was not at that meeting I cannot hold him liable in respect of his being a party to the signing of the agreement entered into with Mr. *Pulbrook*. I can only hold him liable in respect of the sum which he got out of the moneys of the company paid over to Mr. *Pulbrook* by cheque. But to that extent, viewing the transaction as altogether irregular and improper, and as a breach of trust in respect of the funds under the administration of the directors, who, as regards such administration, I take to be trustees as well for the shareholders as for any other persons interested as creditors or otherwise, I must hold Colonel *Colman* liable. The taking of that sum out of the moneys of the company was for a purpose which was incorrect. It was a breach of trust; and therefore I must hold Colonel *Colman* responsible for the particular sum which he got the benefit of in the shape of a payment or a transfer or creation of a debenture debt through the medium of Mr. *Pulbrook*, that is to say, I must hold him liable for the sum of £200.

(1) 9 Ch. D. 595, 599. (2) Law Rep. 10 Ch. 593, 605.

C. A. 1882 *In re* Anglo-French Co-operative Society. *Ex parte* Pelly. V.-C. H.

That, of course, proceeds on the view that there is a general liability of these four gentlemen, and I do not think that there is any real distinction to be made between them. Captain *Pelly* signed the cheque as chairman, and Mr. *Pearse* also signed it, and other parties were I believe present at the meeting when the cheque was directed to be signed. And I hold them all to be liable, because I consider that from the beginning the parties were represented by the directors, the signatories of the memorandum, until some other persons were appointed. The company was an existing incorporated company with a memorandum and articles of association which made no provision for such a payment as £3000 to one of the promoters of this company, either in general words or in any other way.

It was said that another gentleman was the real promoter of the company, but I look upon Mr. *Pulbrook* as being in the position of a promoter, and, at all events, whether he would be called a promoter or not, he was a gentleman who associated and allied himself with persons who were founding this company, and he arranged, as I construe the agreement, to get a sum of £3000, partly in the shape of bounty for this alleged discovery of his, and partly for preliminary expenses, the whole being mixed together, and nothing being defined or separated, or alleged to be proper to be allowed and paid for expenses. The duty of the directors if there was any sum due for expenses was to have ascertained what was a proper charge against the company in such respect; and they ought not to have done what they did. They said in effect to *Pulbrook:* "We are much obliged to you for introducing this discovery to us, and you shall have £3000." No person who has any management or control of the affairs of a company, or who occupies any fiduciary position in reference to a company can merely because such an agreement had been signed say that such a sum could be allowed as against the company or taken out of its assets. The amount itself shews that it was not a proper payment. As has been observed this was a company that was going on. It is not like the case of the *British Seamless Paper Box Company* (1), which has been referred to by Mr. *Grosvenor Woods.* It is not a case of that kind. The parties were in the position of

(1) 17 Ch. D. 467.

owing a duty not merely to the persons who were then interested in the company but to all persons who should afterwards be in the company.

It seems to me that this was a clear misapplication of the money of the company. There has been a struggle to make out a case for the Defendants, and it has been contended that the money came back again into the coffers of the company. I thought at one time it was going to be shewn that the people who got the money paid it back again. But they never did pay it back again. What they did was this. Instead of the actual cash being retained by them, they got the liability of the company in the shape of debentures, and those debentures exist. The money I consider was misapplied, and was improperly taken out of the coffers of the company. It is idle to say that the company is not liable, and that if these persons claim on these debentures the company had a good defence and could fight it out. The company ought not to be put in the position of having to try to get clear of a liability, and to be held harmless either by original proceeding, or by some cross-claim, or in some other way through a long law suit.

The liquidator, as representing the company, is entitled to say to these gentlemen: "You have got the company's money, and you have misapplied it. You may have something to say upon it if any litigation should take place and it is possible that if you pay the company now I might under the circumstances be unable to oppose in that future proceeding your coming in as creditors." But with all those considerations I have nothing whatever to do, and I cannot follow them out. I treat these moneys as being traced from their original taking away; and the subsequent considerations have nothing whatever to do with the case. These gentlemen have either got the company's money or have incurred a liability in respect of the misapplication of it. It seems to me accordingly that a liability must exist as regards the £2600.

As regards the £400, the evidence is open to considerable observation, but the propriety of advertisements for the purpose of getting the debentures taken up is not questioned; and I have no doubt that there was an expenditure incurred, in respect of which the sum of £400 is not an unreasonable or otherwise than

C. A.
1882
In re ANGLO-FRENCH CO-OPERATIVE SOCIETY. *Ex parte* PELLY.
V.-C. H.

proper amount, and I think that Mr. *Pulbrook* and those claiming through him ought not to be deprived of that. Therefore you will give credit as against the £3000 for that £400.

With regard to the question of set-off Mr. *Pearse's* case was very fully and ably argued, and I took time to consider it. And I see no reason for thinking that I then took otherwise than a correct view. Accordingly I shall not on this occasion depart from the judgment I then delivered (1), for I think that the general views there expressed are applicable to this particular case.

W. W. K.

(1) The judgment referred to was as follows:

1880. June 15. HALL, V.C.:—

In this case I have already held Mr. *Pearse* liable under the 165th section of the *Companies Act*, 1862, to pay to the liquidator a portion of certain promotion moneys, which portion I considered he had improperly received. He has claimed to set off against this amount a sum which he says the company owed to him at the date of the winding-up, and I reserved for consideration the question whether the set-off can be sustained; and having considered it I have come to the conclusion that it cannot.

A liability under the 165th section is a liability of a delinquent, and until the order directing payment in respect of it has been made should not be treated (in the delinquent's favour) as a debt from him to the company so as to entitle him to a set-off.

At the time of the winding-up it could not be said by Mr. *Pearse* that there were mutual debts. An order under the 165th section is an order at the instance of the liquidator, creditor, or contributory not upon a claim by the company.

The statute gives rights not only to the liquidator, but also to creditors or contributories; and in this respect goes further than it does as to calls, which are to be enforced by the liquidator only; and I think that it is in respect of an "offence," and a payment as a contribution "to the assets of the company," and that this case is not one of mutual demands. There not being any right to set off given by the 165th section, the statutory liability extends to the whole amount ordered to be paid, the section mentioning only the moneys retained, *i.e.*, the whole amount; therefore I am not at liberty to allow as deduction the set-off claimed. Moreover there were not existing ascertained cross demands at the date of the winding-up. The 101st section of the Act provides for a set-off in certain cases, but treating the sum payable by *Pearse* as a debt of his (which for the present purpose I think it is not), he is not, according to the section, entitled to set-off, the section being, I think, strongly adverse to his claim of set-off.

The subject of set-off in the case of liability to calls was fully considered by the Master of the Rolls in the case of *In re Whitehouse & Co.* (9 Ch. D. 595), and there are many observations in his judgment which are applicable to a liability enforced under the 165th section. That case is the stronger, because the set-off was disallowed even as to a call made and due before the winding-up.

From this judgment Captain *Pelly* and Mr. *Pearse* appealed. The appeal came on to be heard on the 24th of July, 1882.

Davey, Q.C., and *Northmore Lawrence* (*W. Pearson*, Q.C., with them), for the Appellants:—

In order to fix the directors with liability under the 165th section of the *Companies Act*, 1862, it must be shewn that they have been guilty of some misconduct owing to which the company has suffered, and they can only be held liable to the extent of such loss: *Coventry and Dixon's Case* (1); *Buckley* on Joint Stock Companies (2). And here the whole of the £2600 is proved to have come back to the company, and there can be no loss unless these debentures are binding. They are still in the same hands, and all the holders except Captain *Pelly* were parties to the whole transaction, and the debentures are consequently invalid and void, and no loss to the company can occur. The liquidator is in fact endeavouring to approbate and reprobate the transaction. The only loss to the company is the amount of the dividends paid on the debentures: *Pearson's Case* (3); *McKay's Case* (4); *Stringer's Case* (5).

As to Captain *Pelly*, he is a creditor for £331 *bonâ fide* advanced to the company for other expenses, and if liable at all is entitled to set off his claims against his liabilities. There is no set-off in respect of calls, upon the well-known principle that the shareholder is bound to contribute all he has engaged to pay for the benefit of the general body of creditors; but a debt such as this stands upon a totally different footing.

As to the £331, it was not paid for preliminary expenses in the ordinary sense of the word, but for advertisements of which the company has had the benefit.

Hastings, Q.C., and *A. Young*, for the official liquidator, were not called on.

JESSEL, M.R.:—

This is an appeal against a decision of Vice-Chancellor *Hall*

(1) 14 Ch. D. 660.
(2) 2nd Ed. p. 323.
(3) 5 Ch. D. 336.
(4) 2 Ch. D. 1.
(5) Law Rep. 4 Ch. 475.

C. A. 1882

In re ANGLO-FRENCH CO-OPERATIVE SOCIETY. *Ex parte* PELLY.

Jessel, M.R.

making certain directors liable for misfeasance in paying away the company's money. Several points were discussed, and I will deal with each of them shortly. The money was paid in this way. There was a written agreement made between the directors, or rather the company, and Mr. *Pulbrook* who was a promoter, or one of the promoters, by which they agreed to pay him £3000 for the discovery of an idea and for certain services. After the company was formed Mr. *Pulbrook* attended a meeting of the directors and they paid him the £3000.

It is said that a conversation took place in the course of which he undertook to lay out the £3000 in this way: £400 in further advertising, and £2600 in taking from the company directly or indirectly debentures of the company to the amount of £2600. That conversation certainly took place according to the evidence. Mr. *Pulbrook* said he considered it binding upon him as between gentlemen, and Captain *Pelly*, one of the appellants, talks of it as an agreement. There was no resolution of the directors, and nothing in writing. Whether or not Mr. *Pulbrook* undertook to do this, appears to me not to be conclusive as to there being an agreement, I do not think there was any agreement which Mr. *Pulbrook* could have been compelled to perform. There was the previous written agreement, and I do not think the view taken by Mr. *Pulbrook* as to the effect of its being binding in honour only is otherwise than correct. Afterwards Mr. *Pulbrook* says that he did invest the £2600 in the taking up of certain debentures, which he either gave away, or paid away, for services to various people to almost the whole amount, and in that way it is alleged the £2600 got back to the company. The Vice-Chancellor has decided that the payment of the £2600, that is the surplus over the £400, was *ultrà vires* and a breach of trust, and he has also decided that the persons who paid it out of the company's funds are liable to make it good.

As regards the first point I think it is quite clear. I can find no power in the articles of association enabling the directors to make this payment, and I do not think it was an ordinary exercise of the powers of directors. I take the view that the Vice-Chancellor took, that beyond the £400 paid for services the £2600 was a payment to the promoter without adequate consideration, and was

a misappropriation to that extent of the moneys of the company. If that were so, it appears to me that under the 165th section the directors who authorized the payment and who made the payment are liable to replace the money as being guilty of a breach of trust unless they can shew that the money has been otherwise repaid to the company. Now can they shew that? In my opinion they cannot. To say that the money has been lent to the company on debentures payable in the year 1894, with a premium, and interest, and share of profits, is only to shew a kind of investment. The persons who allege repayment would in that case be compelled to obtain the debentures to be delivered up, at all events so as to get rid of any liability there may be on those debentures. It is all very well to say there is no liability upon those debentures. The persons who hold them are not shewn to be before the Court; they may have given value for them, and they may not have had notice of all the circumstances of the case. It by no means follows that, because they were paid for with the money furnished by Mr. *Pulbrook* which he obtained from the company, they knew he had wrongly obtained it, or that the whole amount, or a much larger portion of the amount than the £400, was not properly payable. It appears to me, therefore, that it is not repayment.

There are other difficulties in the way of those who allege that it is repayment. In the first place, if there was no agreement on the part of Mr. *Pulbrook* to reinvest, then of course it was a voluntary investment; but why the company should not be entitled to the benefit of it, that is to say, to the benefit of the money on giving the security, as well as to the liability of the persons, I cannot see. You cannot compel the company to say they will not take the benefit of the advance. If these gentlemen paid back the money then it was in that sense a benefit to the company, because they received so much additional capital. But I cannot accede to the argument as to there being a loss to the Appellants and a gain to the company on the debentures. At the time these debentures were issued it appears that the public were taking the debentures at their full value, and that at a subsequent period to this the public took the debentures at their full value, and that shews, according to the authorities, that these debentures

C. A. 1882 *In re* ANGLO-FRENCH CO-OPERATIVE SOCIETY. *Ex parte* PELLY. Jessel, M.R.

must be estimated as being worth their full value. Therefore the company gave full value for the amounts advanced to the company. Nor do I think it is an answer to say that if you can prove that the holders of debentures knew all the circumstances they will be able to recover nothing upon them; nor is it a sufficient answer to say that even if you could not prove that they knew all the circumstances, yet you have given sufficient evidence to trace the money and shew that it was the money which originally came from the company's coffers. Under the circumstances I have mentioned I do not think that would get rid of the liability, which is a liability to repayment. This being so, therefore it appears to me the order of the Vice-Chancellor is so far right.

Now I come to another question. Assume that Mr. *Pulbrook* did agree to invest the money, does it make any difference? It does not appear to me that it does. It was a payment to Mr. *Pulbrook* unauthorized, and it was an agreement to invest in debentures of equivalent value. That could not make it an authorized payment, nor could, for the reasons I have mentioned, his investment make it a repayment, and I should come to the same conclusion if I thought it was an agreement, and not merely an honourable understanding.

I now come to another point. It is suggested that one of the Appellants, Captain *Pelly*, being a creditor of the company for money lent, is entitled to set off the amount due to him against the amount which may be found due from him under the 165th section. I think not. In the first place the right of set-off is not a common law right, it is a statutory right, and it is grounded upon the statutes, which limit it in various ways. No one can suggest that a summons under the 165th section is within those statutes. Therefore it appears to me there is no right of set-off at all.

But there is another ground. It is said assuming it not to be within the right of set-off, still the Court ought to give the Appellant the same benefit under the 165th section as if an action had been brought against him. Well, I am not at all able to see that. The power given by the Act is to compel him to repay moneys which he has so applied or retained, or for which he has become liable or accountable, together with interest after

such rate as the Court thinks just. So that the Court has power by statute to make him repay. If the statute had intended that he should have a right of set-off, why did it not say so? But when you look at the 101st section you will see how the ordinary case of innocent people who happen to owe money to a company, and who happen to be contributories of the company, is dealt with. By the 101st section contributories of a limited company who owe money to the company must pay it to the company, although the company may owe them money. That is the meaning which has been attributed to that section, although it does not say so in so many words; but that is the result of the authorities upon it. If an ordinary contributory, perfectly innocent, is deprived of the right of set-off which he would have had in an action, what is to be said as to a director, manager, or any other officer of a company who has misapplied money. Is it to be supposed that the framers of the statute who have deprived an ordinary innocent contributory of the right he would otherwise have had of set-off against the company if he had brought an action, could have intended to give such a benefit to the persons who have committed what is described in the 165th section as an offence? I think if we wanted an additional argument to shew that no such set-off was intended by the Legislature, we have it in the construction which has been put on the 101st section. It appears to me, therefore, that there is no right of set-off, and that being so, there being neither repayment nor right of set-off, I think the appeal cannot be allowed.

Then there is, of course, another difficulty in the Appellants' way. They have not got before the Court the persons entitled to these debentures, and they are not in a position to litigate that question now; but I think that any order we make now should be without prejudice to any application the Appellants may make with respect to the debentures. We were very much pressed during the argument with this observation. It was said that if we decide against the present Appellants we allow the company to get a double benefit. But I do not see that. The company simply gets back its money, and that is all. It is liable to pay on debentures. It cannot set up a defence upon its debentures having had the money. And when it is said that the

C. A. 1882 *In re* ANGLO-FRENCH CO-OPERATIVE SOCIETY. *Ex parte* PELLY. Jessel, M.R.

debenture holders will get a dividend out of the money which has been wrongfully taken away from the present Appellants, I cannot see that either. There is no fraud in this case, and if they are entitled to follow the money they must be entitled to take the benefit of the debentures. A trustee who invests money upon a bad security, or otherwise commits a breach of trust, is entitled to the benefit of the security when he makes good the breach of trust, and, therefore, if it were taken to be that it was an improper investment by the directors of the company's money on these debentures, the directors would still be entitled to the benefit of the debentures. It does not appear to me, therefore, that the supposed injustice would follow from our decision, and the words we propose to insert will give the present Appellants an opportunity of trying the question. I think, therefore, the appeal should be dismissed.

BRETT, L.J.:—

In this case the Vice-Chancellor acting under the, to my mind, most salutary provisions of the 165th section has determined that the Appellants have committed a breach of that trust which was reposed in them as directors of this company, and that breach consisted in wrongfully paying away money of the company to the extent of £2600, and he has thereupon directed that they be personally liable to repay to the company that money.

Now if it had not been for the interpretation put upon the 165th section by *Coventry and Dixon's Case* (1), I could not have had the least doubt that, taking the facts in the view most favourable to the Appellants, it would have been most unjust not to make them repay the whole of the £2600 to the company. Because, as it seems to me, their case at the highest comes to this, that these directors wrongfully paid £2600 of the company's money to a person of the name of *Pulbrook* upon an agreement that he should with that money purchase debentures. Then it is said that he did purchase debentures, and that he did give those debentures to certain directors of the company for certain reasons, and under such circumstances that he or the company cannot recover back those debentures from these directors;

(1) 14 Ch. D. 660.

in other words, that those directors should pay away the money of the company to Mr. *Pulbrook* upon an agreement that he should buy debentures with that money, and then commit a second offence by improperly giving those debentures to directors for an improper purpose. I should not have had the least doubt if it had not been for the restricted interpretation put upon this section by *Coventry and Dixon's Case* (1) that it would have been most right and just that directors acting in such a way should be made to pay back the whole of the money. I confess that I am extremely sorry that the restrictive interpretation which *Coventry and Dixon's Case* has put upon the 165th section has been put upon it; because I have always thought that that section was the most salutary section in the whole of the Act, and one intended to meet, I should have thought, in the very widest terms transactions which have become a perfect scandal in the getting up of companies in this country. However we are bound by the interpretation which has been put upon that section by the decision in *Coventry and Dixon's Case*.

Now I will consider what the facts of this case are, subject to that interpretation. Supposing that there was no agreement between the company and Mr. *Pulbrook* as to the mode in which he would expend this sum of £3000, or I would rather say the £2600. What has happened is this: These directors have paid to Mr. *Pulbrook* £2600 to do with it as he Mr. *Pulbrook* might think fit, and as it happens, not being bound by any agreement, Mr. *Pulbrook* has lent the sum of £2600 to the company. But if there was no agreement those two transactions are absolutely independent. The money is not identified, and it would remain therefore that the directors have paid to Mr. *Pulbrook*, and for a purpose which it was not seriously argued was not contrary to the 165th section, the sum of £2600. Upon the clearest possible view of the matter therefore they are bound to pay back that sum of money to the company. But supposing there were an agreement with Mr. *Pulbrook* that he should purchase with that money debentures, how does the case stand then? It seems to me that the case stands in this way. The directors paid to Mr. *Pulbrook* £2600 of the company's money. The moment they

(1) 14 Ch. D. 660.

C. A. 1882 *In re* Anglo-French Co-operative Society. *Ex parte* Pelly. Brett, L.J.

had done that wrongfully, it seems to me that the damage to the company in any view of the matter would be £2600. The moment you have paid away a person's money wrongfully he is damaged to the extent of that payment. Nothing can lessen the extent of that damage unless the money has been, before the supposed action has been brought, paid back into the hands of the person from whom it was taken as free to him as it was before. Now it is true that the money has gone back into the hands of the company, but it has not gone back into the hands of the company as free in their hands as it was before it was paid out; because it was paid back to the company for debentures issued by them. Unless those debentures are given back to them, unless those debentures are given back to them free without any expense to them, so that they have the debentures in their hands and are free to tear them up, and can have the money in their hands, and be free to use it as they please; they have not the money back in their hands as free as it was before, because it is saddled with this, that they must take some means to get back the debentures. Well it may be that they could get back the debentures, but are they bound to go to the expense of endeavouring to get them back? It may be that they could not get them back; but even supposing that by some successful procedure they got the debentures back, if the persons from whom they recovered them were insolvent they would at least have to pay the costs of the proceedings. They have not therefore the money free in their hands as they had it before, and therefore it seems to me the loss which was once £2600 remained the same loss at the time when a supposed action would be brought, that is, when these proceedings are taken under the 165th section. Even in that view therefore the decision of the Vice-Chancellor is right; but I think the true view of the facts in this case is that there was no agreement, and that therefore this was a simple paying away of this money to Mr. *Pulbrook* by the directors for him to do with it as he should please. That appears to me to be the construction of the written agreement which was made by these directors, assuming to act for the company, and Mr. *Pulbrook*. By that written agreement it seems clear that he was entitled to do whatever he pleased with the £3000 the moment he got it.

The next question is whether one of the Appellants, Captain *Pelly*, has a right of set-off in respect of a sum which it is said the company owes to him. It is hardly necessary I think to say that the right of set-off only arises where there is an action between parties. It is a statutable remedy which only is given in the case of an action, and is not given in the case of every action, but only of certain actions. It is said that this is a summary remedy instead of an action, and that therefore the statute ought to apply. But there are many cases known with regard to small matters in which a person may bring an action for debt and may also have a summary remedy before a magistrate or otherwise to recover back the same sum. It has never been suggested or supposed that the statute as to set-off applies when the summary remedy is the one adopted. It is not within the words of the statute. In the present case the *Companies Act* gives a summary remedy. The statute of set-off does not apply, and no set-off can therefore be entertained.

Then it has been suggested that although the right of set-off is not given by the statute, yet we ought to construe this section so as to say that the Legislature intended the right of set-off to be given under it. If it had not been for the interpretation put upon the section by *Coventry and Dixon's Case* (1), I think a great deal more might have been said in that respect. It might have appeared to the Court to be just in certain cases, where a person had a counter-claim against the company, to say that the Court would take notice of it in adjudicating upon what they thought it would be just and right that the person should pay to the company. The moment you limit the section and say it is a summary remedy there is nothing on the face of the section from which it would be reasonable to infer that the Legislature meant that the right of set-off should be given, and that the statute as to set-off should be extended to this section. There is no ground for that implication; it is not expressed in the section, and it does not exist.

It appears to me, therefore, that from every point of view the decision of the Vice-Chancellor is correct.

(1) 14 Ch. D. 660.

C. A. 1882 *In re* Anglo-French Co-operative Society. *Ex parte* Pelly.

Cotton, L.J.:—

In this case the Vice-Chancellor has, under sect. 165, held the Appellants and others liable for a sum of £2600; and I am unable in any way to differ from that conclusion. Now the first question is, whether the sum of £2600 was paid in such a way as to be a misappropriation of the moneys of the company. It was hardly contended that that original agreement could be supported, or that the payment of the money under it was a proper appropriation of the moneys of the company. I agree with the Master of the Rolls that it was a misappropriation. And in that case, although Captain *Pelly* derived no benefit from the money, and the payment was not made with any corrupt motive, yet notwithstanding, being in the position of a director, he is liable to make good any moneys the company intrusted to him for the purpose of being dealt with according to the provisions of the articles. It was not dealt with in that way, but in some way not authorized, and in one which cannot be justified.

But then comes the question, which has occupied a good deal of argument, what amount the Appellants are liable to make good? I should have said nothing about *Coventry and Dixon's Case* (1) unless it had been questioned by some other members of the Court. It is, of course, binding on the Court, but I must consider it not only as a binding decision but as one the principle of which I approve. Looking at sect. 165 as giving a summary proceeding to enable moneys which have been misappropriated or misapplied to be recovered without action or any other proceeding independently of that section, what is the amount for which the Appellants are liable? As I understand, the argument was put in this way—It is said that what they are to make good under sect. 165, is the loss which the company have actually sustained in consequence of the breach of trust. That is here only the amount of dividend which will be paid on the debentures which were taken up by this money which they have been ordered to repay.

Now, of course, the matter would stand in a very different position if there was no agreement binding Mr. *Pulbrook* to invest any part of this money in debentures of the company. I will deal

(1) 14 Ch. D. 660.

with it as if it had been made out that there was an agreement binding upon him. But then how does it stand? Here the moneys for which the Appellants have been made liable were in fact paid out of moneys of the company, and without any justification were misapplied. In my opinion that made the directors liable to bring back that money, and unless that money has been repaid they are liable. It was said that the money has been brought back; but it has not been in the way of repayment, it has only been brought back as a sum paid in order to get the debentures. Debentures are not simply I.O.U.'s or acknowledgments of indebtedness by the company, they are things which are ordinarily known in the market as bearing a good value if the company is solvent and are really valuable securities. Supposing, therefore, that the £2600 is to be taken as having been brought back by Mr. *Pulbrook*, the debentures were issued by the directors without any payment being made for them. That would make them liable as for the loss to the company of that money which at any time might have been obtained in the market by the issue of those debentures to persons willing to pay their own money for the purpose of investing it in those debentures. That would make them liable for the amount for which, as it appears here, they are charged, it appearing here that after this time the debentures were taken by the public—taken openly in the market by the public who paid their own money for them, and apparently at par. Well, that being so, in my opinion whatever may be the rights of the Appellants, having paid this money, to get the debentures and then to take a dividend from the company upon those debentures, that will not be a ground of relief to the Appellants as against the present claim of the liquidator to have the money repaid, which is equivalent to the value of the debentures at the time when they were issued by the directors without any consideration being paid for them except out of the money of the company.

The only other matter is the question of set-off. Now, in my opinion, that really is determined by sect. 101, although it is not within the exact terms of that section. There we have in effect a declaration "that no person standing in the position of a contributory of a company shall in respect of any claim which he has

C. A. 1882 — *In re* ANGLO-FRENCH CO-OPERATIVE SOCIETY. *Ex parte* PELLY. — Cotton, L.J.

against the company have any right of set-off as against a claim of the company unless it is an unlimited company," which this is not. In a limited company there is to be no such right until all the creditors of the company have been paid. If it is not within the exact terms of that section, in my opinion it is within the meaning of it, and it prevents us allowing any such set-off as has been contended for on behalf of the Appellant.

The appeal must be dismissed with costs, without prejudice to any application the Appellants may make in respect of the debentures.

Solicitors: *J. Holmes; Davidson & Morriss.*

M. W.

C. A. 1882 — *July* 26.

In re ARTISTIC COLOUR PRINTING COMPANY. *Ex parte* FOURDRINIER.

Winding-up — Execution — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 163 [*Revised Ed. Statutes, vol. xiv. p.* 238]—*Bills of Sales Registration Act* (17 & 18 *Vict. c.* 36), *s.* 1 [*Revised Ed. Statutes, vol. xii. p.* 22].

23 Ch D 257

Where an execution against the goods of a company which is being wound up is avoided by the *Companies Act*, 1862, s. 163, it is avoided altogether, and the creditor retains no interest under it.

Whether, under 17 & 18 Vict. c. 36, s. 1, the taking in execution of goods comprised in an unregistered bill of sale defeated the bill of sale wholly or only to the extent necessary to give effect to the execution, *quære.*

The position in *Richards* v. *James* (1), that it has the former effect, doubted.

ON the 31st of March, 1880, *Fourdrinier, Hunt, & Co.* recovered judgment against the company for £3550, and on the same day issued a writ of *fi. fa.*, under which the sheriff seized the goods of the company on the following day.

On the 24th of March, 1880, a resolution for winding-up the company was passed at an extraordinary general meeting, and a liquidator was appointed, and on the 17th of April an order was made continuing the winding-up under supervision.

On the 11th of May, 1880, an order was made in Chambers for the sheriff to withdraw from possession.

(1) Law Rep. 2 Q. B. 285.

On the 27th of March, 1880, *William Chappell* commenced an action on behalf of himself and all other the debenture holders of the company, asking for a declaration that the debenture holders were entitled to a first charge on all the property to which the company was entitled at the commencement of the winding-up for securing the payment of the principal and interest due on the debentures, and for consequential relief. The debentures were bonds not registered as bills of sale, and each of them expressly charged all the present and future property and undertaking of the company (other than uncalled capital) with the payment of the principal sum for which the debenture was given, and interest, and declared that the holders of all debentures should be entitled to a first charge on the undertaking and property of the company *pari passu*.

The company put in a statement of defence, which alleged that some of the debentures had not been duly issued, and that the holders thereof were not entitled to the benefit of the security purporting to be thereby given, and also claimed to have the expenses of winding-up provided for in priority to the claims of the debenture holders.

Fourdrinier, Hunt, & Co. then took out a summons asking for leave to defend the action in the name of the company, alleging that the order of withdrawal must operate in favour of the liquidator of the company and not in favour of the debenture holders, whose securities were not registered as bills of sale, and that the statement of defence was therefore not a proper one. Mr. Justice *Chitty* refused the application, and the applicants appealed.

Ince, Q.C., and *Terrell*, for the Appellants:—

We, as judgment creditors, could defeat the debenture holders, who are not registered incumbrancers. The liquidator ousted us, and then the debenture holders bring their action. The withdrawal of the execution must be for the benefit of the company, not of the debenture holders.

[Jessel, M.R.:—Sect. 163 avoids your execution.]

That section, it is true, says that the execution shall be void to all intents, but that must mean only for the purposes of the Act, not for the purpose of taking away our rights as against other

C. A. 1882 *In re* Artistic Colour Printing Company. *Ex parte* Fourdrinier.

parties. The language is not the same as that of the *Bills of Sale Act*, under which it was held in *Richards* v. *James* (1) that an execution put an end altogether to an unregistered bill of sale.

Romer, Q.C., and *H. Burton Buckley*, for the liquidator, were not called upon.

Jessel, M.R.:—

This is an appeal from the refusal of Mr. Justice *Chitty* to allow the applicants, who were execution creditors of the company, to defend an action brought by debenture holders against the company. The applicants seized under an execution a quantity of articles which were chattels within the meaning of the *Bills of Sale Act*. They were ordered under the *Companies Act*, 1862, s. 163, to withdraw from possession, and their contention now is that notwithstanding that section their execution has some force left in it. The difference between the language of that section and the language of the *Bills of Sale Act* is very material. According to the plain terms of sect. 163, the execution is void to all intents—there is therefore no force left in it. I give no opinion on the position in *Richards* v. *James* as to the effect of an execution on an unregistered bill of sale. I am not prepared to say that it avoids it altogether. Suppose a bill of sale given for £1000 and not registered, and then a judgment creditor for £10 takes out execution and seizes the goods while still in the possession of the debtor. The execution is good as against the bill of sale, but I am disposed to think that the holder of the bill of sale can claim the residue.

Brett, L.J.:—

Sect. 163 says in plain terms that the execution is to be void to all intents. The Appellants want to make out that it is good to some intents.

Cotton, L.J.:—

It is hardly necessary to give any opinion as to the effect of sect. 163. The appeal is from a decision of the Court below on

(1) Law Rep. 2 Q. B. 285.

the question who shall defend a certain action, which is a question for the discretion of the Judge, and no reason has been shewn why we should interfere with the exercise of that discretion. At the same time I may say that I do not differ from the opinions which have been expressed as to the meaning of that section.

Solicitor for Appellants: *T. E. Watkin.*
Solicitors for Liquidator: *Wilkinson & Howlett.*

H. C. J.

GLEN *v.* GREGG.

[1881 G. 1045.]

Registered Building—Leave of Charity Commissioners—16 & 17 *Vict. c.* 137, *ss.* 17, 62 [*Revised Ed. Statutes, vol. xi. pp.* 986, 999]—18 & 19 *Vict. c.* 81, *s.* 9 [*Revised Ed. Statutes, vol. xii. p.* 554].

An action for removing the minister of a building registered as a place of meeting for religious worship and for administering the trusts of the deed relating to such building can be prosecuted without the certificate of the Charity Commissioners.

Attorney-General v. *Sidney Sussex College* (1) observed upon.

BY an indenture dated the 23rd of January, 1878, after reciting that a religious body had been formed called the Reformed Episcopal Church under certain canons adopted at a general council of the said church, it was witnessed that a piece of land at *Southend* (whereon a building called *Trinity Church* was afterwards erected) was conveyed to the use of *J. G. Glen, J. R. Hemmann, T. H. Gregg, F. Belcham,* and *C. Webb,* and their heirs, upon trust to permit the same to be used for the purposes of the congregation assembling and worshipping according to the principles of the said Reformed Episcopal Church; and that the same should be under the control of the vestry of the congregation.

T. H. Gregg appeared to have been appointed minister or rector of *Trinity Church,* and he entered upon the duties of his appointment. The church was registered as a place of meeting for religious purposes.

(1) 15 W. R. 162.

C. A. 1882 GLEN v. GREGG.

In May, 1881, this action was brought by *J. G. Glen* and *J. R. Hemmann* against *T. H. Gregg* and the other trustees, alleging that *T. H. Gregg* had ceased to be a member of the Reformed Episcopal Church, and that his name had been erased from the roll, and claiming that he might be restrained from officiating as rector, and that he and the other two Defendants might be removed from being trustees of the said indenture, and that if and so far as might be necessary the trusts of the deed might be administered.

The Defendants denied that *T. H. Gregg* had ceased to be a member of the Reformed Episcopal Church, and witnesses on this point were examined for the Plaintiffs.

The action came on for hearing before Mr. Justice *Kay* on the 28th of April, 1882.

Cozens-Hardy, Q.C., and *S. Brice*, for the Plaintiffs.

Rigby, Q.C., and *Jason Smith*, for the Defendants, took the objection that such an action could not be brought without the certificate of the Charity Commissioners according to sect. 17 of the *Charitable Trusts Act*. It did not come within the exceptions of the 62nd section: *Attorney-General* v. *Sidney Sussex College* (1) (2).

(1) 1866. Nov. 5, 6; Dec. 4.

ATTORNEY-GENERAL *v.* SIDNEY SUSSEX COLLEGE, CAMBRIDGE.

College—Leave of Charity Commissioners—16 & 17 *Vict. c.* 137, *ss.* 17, 62.

THIS was an information against *Sidney Sussex College, Cambridge*, and *Trinity College, Cambridge*, as to the proceeds of estates held under the will of *Francis Combe*, the principal question being whether the gift by the will was for educational purposes entirely, or partly for the benefit of the poor kindred of the testator's wives. The Master of the Rolls said that his impression was that the gift was for the benefit of certain of the poor kindred, and he directed an inquiry accordingly.

The colleges appealed, and the case was argued on the merits, but

Cole, Q.C., and *Rigby*, for *Sidney Sussex College*, took the objection that the leave of the Charity Commissioners ought to have been obtained.

Selwyn, Q.C., and *V. Hawkins*, for *Trinity College*.

Baggallay, Q.C., and *Bedwell*, in support of the information:—

The objection is too late; and moreover there is a suit of *Attorney-General* v. *Greenhill* as to this charity

(2) 15 W. R. 162.

They offered to waive the objection if the Court thought that on behalf of trustees they could do so.

Cozens-Hardy, Q.C., and *S. Brice*, for the Plaintiffs:—

This is a registered place of public worship, and is by sect. 62 excluded from the Act: *In re Meyrick's Charity* (1). There was no decision in *Attorney-General* v. *Sidney Sussex College* (2), as the objection was waived, and the case proceeded. The question here does not relate to property, and is merely as to doctrine. In no such case has the leave of the Charity Commissioners ever been required or obtained: *Dean* v. *Bennett* (3). As to the meaning of sect. 17 of the Act: *Holme* v. *Guy* (4).

KAY, J.:—

I am afraid that I must yield to this objection, but I confess that I do it with reluctance, because this decision of Lord *Chelmsford*—which I must treat with respect and as binding on me—does not altogether satisfy me.

The first question is, whether this action comes within sect. 17,

---

still pending. Besides the colleges are excepted by sect. 62 of the Act.

Cole, in reply, for *Sidney Sussex College*.

Selwyn, in reply, for *Trinity College*.

LORD CHELMSFORD, L.C., said that the objection had been urged for the first time before him that the suit could not proceed without the fiat of the Charity Commissioners. The 17th section of the Act was imperative, but it had been argued that the 62nd section rendered the 17th inapplicable to a case like this. It would be strange if it were so, as then a clause intended for the benefit of the colleges and universities would be turned to their disadvantage, as informations might be filed against them without the protection of the fiat. The objection if persisted in must prevail, but in that case His Lordship would give leave to apply to the Commissioners, and he would suspend the decree for that purpose.

Cole, Q.C., said that if the Court had jurisdiction to proceed with the suit, he, on the part of the college, should not insist on the objection.

THE LORD CHANCELLOR then delivered judgment on the questions raised in the suit and reversed the decree of the Master of the Rolls so far as related to the construction of the will, and directed other inquiries.

Solicitor for the Relator: *Rivington*.

Solicitors for the Colleges: *J. & C. Cole*; *Philpot*.

(1) 1 Jur. (N.S.) 428.

(2) 15 W. R. 162.

(3) Law Rep. 6 Ch. 489.

(4) 5 Ch. D. 901.

C. A. 1882 GLEN v. GREGG. Kay, J.

of the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), which provides that "before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending), for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced, presented, or taken by any person whomsoever," there shall be a certain notice given to the Charity Commissioners and their certificate or fiat obtained. Now, I have no doubt that this particular action comes within that section. The claim alleges that the Defendant *Gregg* has seceded from the Reformed Episcopal Church, and asks for an injunction against him, and for administration of the trusts of the deed of 1878. The relief asked for is therefore relief which before the passing of the Judicature Act could only have been granted by the Court of Chancery, and the application is founded entirely on the jurisdiction which the Court of Chancery would have had, and which every Court now has, to administer the trusts of property under a particular deed. That distinguishes the case from *Holme* v. *Guy* (1), the decision in which was that the 17th section of the Act was never intended to interfere with proceedings against third persons by trustees of charities as owners of property or as employers of servants. There is no allegation here that the Defendant *T. H. Gregg* is a minister who was not properly appointed; there is no allegation that he is a mere trespasser; but the relief which this action seeks is such as would have been obtained by a suit in Chancery to have the trusts of the deed administered, and to have it declared that according to those trusts *T. H. Gregg* had no right to retain his position as minister of the chapel—in short to remove him under the equitable jurisdiction of the Court. Whether that relief could be obtained or not is not now the question; but the question is whether an action of that kind is or is not within sect. 17 of the *Charitable Trusts Act*, 1853, and I think it comes within that section.

Then the next point is whether it is excepted by sect. 62 of the same Act, which provides that "this Act shall not extend to the universities of *Oxford, Cambridge, London*, or *Durham*, or any college or hall in the said universities . . . . or to any building

(1) 5 Ch. D. 901.

C. A. 1882 GLEN v. GREGG. Kay, J.

registered as a place of meeting for religious worship." Now this action does relate to the trusts of a building so registered. *Primâ facie*, this section would seem to exempt such a building entirely from the operation of the Act, and of course if it is entirely exempted, it is exempted from sect. 17 of the Act. But in the case of *Attorney-General* v. *Sidney Sussex College* (1) that question was considered, and Lord *Chelmsford* then said it had been argued that sect. 62, which provided that the Act should not extend to any college or hall in the universities, rendered sect. 17 inapplicable to the case, but if that were so the clause of exemption intended for the benefit of the universities would turn to their disadvantage, as informations might then be filed against them without the previous permission of the commissioners being obtained. That was a suit by way of information and for partial administration of the trusts of a will, and I cannot see the smallest difference between the cases; and if there be any minute difference or shadow of a difference it appears to me most inexpedient to draw fine distinctions for the purpose of evading a case which does not entirely satisfy one's own mind. I have said that it does not satisfy my mind; but it is a decision to which I am bound to bow, and therefore I must do as Lord *Chelmsford* proposed to do in that case. I must direct the action to stand over to give the Plaintiffs an opportunity of obtaining the requisite authority from the Charity Commissioners, and I give liberty to apply if the leave is not obtained within a reasonable time.

C. M.

C. A.

The Plaintiffs appealed.

The appeal was heard on the 26th of July, 1882.

Cozens-Hardy, Q.C., and *S. Brice*, for the Appellants:—

The enactment 18 & 19 Vict. c. 81, s. 9, which was not cited below, is decisive of this case, and is not the subject of Lord *Chelmsford's* decision.

[They were then stopped by the Court.]

Rigby, Q.C., and *Jason Smith*, for the Defendants:—

The wording of the clause referred to is more favourable to the

(1) 15 W. R. 162.

C. A. 1882 GLEN v. GREGG.

view taken by Lord *Chelmsford*, than the wording of the clause with which he was dealing. That clause said that the Act should not extend to institutions of certain specified classes, *i.e.*, that they should not for the purposes of the Act be considered charities. The present clause only says, that registered places of worship shall be exempted from the operation of the Act. A benefit to them was intended, as was said by Lord *Chelmsford*, and it certainly is not for their benefit to let suits be brought against them without the protection afforded by the discretion of the Charity Commissioners. This is his *ratio decidendi*, and to decide against the objection on the ground that his Lordship did not deal with the later clause, would, in substance, be overruling his decision.

JESSEL, M.R.:—

I think that the objection of the Defendants ought not to prevail. The difficulty arises from the supposed decision of Lord *Chelmsford*, in the case of *Sidney Sussex College* (1). But it is to be observed that, although his Lordship is reported to have said that the objection if persisted in must prevail, still the case proceeded. Now, if the case was within the provisions of the Act, the Court had no jurisdiction to hear it without the certificate of the Commissioners, and no assent could give the Court jurisdiction. I therefore cannot treat that case as embodying any deliberate decision of the Lord Chancellor. We are then left to form our own judgment as to the construction of the Act, and it appears to me to be plain. Certain institutions were taken out of its operation, and I think that the effect of the clause in the late Act is precisely the same. It is necessary to state our view as to the supposed decision of Lord *Chelmsford*, because I agree that the language of the clause in the latter statute is more favourable to the Respondents than that of the earlier.

BRETT, L.J.:—

I am not prepared to differ from the conclusion that the opinion attributed to Lord *Chelmsford* in the *Sidney Sussex Case* was not

(1) 15 W. R. 162.

a deliberate opinion—but a view thrown out in the course of the argument and not acted upon. Had it been otherwise, I should still have been prepared to join in deciding against the objection, for a decision of Lord *Chelmsford* as to the meaning of the clause in the earlier Act cannot bind us as to the construction of a clause expressed in very different terms.

COTTON, L.J. :—

I also think that the objection should not prevail. I think so, for the reasons given by the Master of the Rolls, and I prefer resting my judgment on them to resting it on the ground that the decision of Lord *Chelmsford* was not a decision on the words of the later Act. With all deference, it appears to me that to decide on the latter ground would be frittering away his decision without looking at the reason of it. The plain meaning of each of the clauses referred to is, that none of the provisions of the Act shall apply to certain specified charities, and I think that Lord *Chelmsford* never intended finally to decide the contrary.

Solicitors for Plaintiffs: *Young & Son.*
Solicitors for Defendants: *Smith & Wood.*

H. C. J.

In re EXCHANGE BANKING COMPANY.

FLITCROFT'S CASE.

Companies—Directors—Payment of Dividends out of Capital—Set-off—Statute of Limitations.

The directors of a limited company for several years presented to the general meetings of shareholders reports and balance-sheets in which various debts known by the directors to be bad were entered as assets, so that an apparent profit was shewn though in fact there was none. The shareholders, relying on these documents, passed resolutions declaring dividends, which the directors accordingly paid. An order having been made to wind up the company the liquidator applied, under sect. 165 of the *Companies Act*, 1862, for an order on the directors to replace the amount of dividends thus paid out of capital :—

Held, by *Bacon*, V.C., and by the Court of Appeal, that as regards each half-yearly dividend the persons who were directors when it was paid were liable for the whole amount paid for the dividends of that half-year, and that

C. A.
1882
FLITCROFT'S CASE.

In re National Funds Assurance Company (1) is in no way affected by *Coventry and Dixon's Case* (2).

The order of *Bacon*, V.C., declared them to be jointly liable, but this was varied on appeal by declaring them jointly and severally liable :—

Held, that even if the shareholders had known the true facts, so that their ratification of the payment of dividends would have bound themselves individually, they could not bind the company, for that the payment of dividends out of *corpus* was *ultrà vires* the company, and incapable of ratification by the shareholders :

Held, further, that the fact that the capital thus improperly applied was distributed *pro ratâ* among the whole body of shareholders did not protect the directors, for that the shareholders were not the corporation, and that payment to them would not prevent the corporation before winding-up, or the liquidator after winding-up, from compelling the directors to replace the money that it might be applied to proper purposes :

Held, further, that the directors could not set off any money due from the company to them against the amounts which they were ordered to replace :

Held, also, that the claim was for a breach of trust, and that the *Statute of Limitations* could not be set up.

THIS was a summons by the official liquidator, under sect. 165 of the *Companies Act*, 1862, asking to have the directors declared liable to make good to the assets of the company sums amounting in all to £3192, improperly paid by way of half-yearly dividend to the shareholders from the 22nd of July, 1873, to the 30th of July, 1878, both inclusive. The half-yearly sums so paid varied from £214 to £324.

The case established was that though the directors had made out half-yearly balance sheets which shewed an apparent profit, this result was arrived at by treating as assets sums which were in fact bad debts, the acceptances for them having been dishonoured, and that the whole of the dividends had in reality been paid out of capital to the knowledge of the directors for the time being.

The persons sought to be made liable were five, viz., *Simpson* and *Flitcroft*, who were directors throughout, *Grundy*, who retired in January, 1874, *Bardsley*, who became a director in July, 1873, and retired in April, 1878, and *Ramwell*, who became a director in January, 1878, and retired in February, 1879. The summons sought to make *Simpson* and *Flitcroft* jointly and severally liable for the whole £3192, *Grundy* for one dividend of £225, *Bardsley*

(1) 10 Ch. D. 118. (2) 14 Ch. D. 660.

for £2749, and *Ramwell* for £2476, the amounts of dividend declared while they were respectively directors.

Simpson had become bankrupt. *Flitcroft*, *Bardsley*, and *Ramwell* set up the case that they had respectively paid moneys for the company under a guarantee which they and *Simpson* had entered into for a debt of the company, and that the company was also indebted to them respectively in other sums of money. They claimed respectively to set off what was thus owing to them respectively by the company against anything for which they might be held liable on the summons, and they claimed the benefit of the *Statute of Limitations* as to all dividends paid more than six years before the issue of the summons.

The summons was heard before Vice-Chancellor *Bacon*, on the 18th of April, 1882.

Davey, Q.C., and *Ryland*, for the official liquidator, in support of the summons:—

It is clear that the whole transaction with regard to the payment of dividends was illegal. The directors misled the shareholders by representing as good debts which they knew to be bad, and they knowingly paid dividends out of capital which was a misapplication of the company's funds. As to the defence of a set-off, it will be time to talk about that when they bring in their claim under the winding-up. The doctrine of set-off is a mere creature of statute, and you cannot set off a joint debt against a several debt. If you bring an action against a man for debt, he cannot set off a joint liability.

Then there is the plea of the *Statute of Limitations*, an answer to which is to be found in *Burdick* v. *Garrick* (1). The only statute which can apply is that of 21 Jac. 1, c. 16, which does not extend to equitable claims. Courts of Equity adopt the statute by analogy, but they never admit an analogy where the claim is by a person in a fiduciary position. Did one ever hear of the statute being allowed to prevail against a breach of trust?

That a director is chargeable on the ground of his being in a fiduciary position will not be disputed: *Parker* v. *McKenna* (2).

(1) Law Rep. 5 Ch. 233. (2) Law Rep. 10 Ch. 96.

C. A. 1882 — FLITCROFT'S CASE.

Hemming, Q.C., and *Edge*, appeared for *Grundy*, but before the conclusion of the argument the case, as affecting him, was compromised with the sanction of the Court.

Warrington, for the directors *Flitcroft*, *Bardsley* and *Ramwell*:—

Admitting that the debts were bad, all that the Respondents were guilty of was an error in judgment; they were misled. They derived no personal advantage which was not shared by the other shareholders. Fraud is not alleged, or at any rate not proved; and hence the debt, if any, is not an equitable debt; it is a misfeasance: *In re Forest of Dean Coal Mining Company* (1). They were not agents, as was the solicitor in *Burdick* v. *Garrick* (2); and if the remedy in Equity be merely supplementary to that at Common Law, the Court will act by analogy to the statute: *Knox* v. *Gye* (3).

Supposing they have mismanaged, or even been guilty of a tort, they have not taken the company's money. Directors cannot be compelled to refund exaggerated dividends, nor are they liable for having unknowingly represented bad debts to be good: *Turquand* v. *Marshall* (4). As in *Coventry* and *Dixon's Case* (5) the Respondents have been guilty of no more than misconduct.

As to the set-off; the official liquidator's application is not against the directors jointly; he has asked for a separate declaration against each. The liability, if it exists, being joint and several, and the liquidator not making merely a joint claim (or only joint as to *Simpson* and *Flitcroft*) there is a set-off. Moreover, the set-off arises from a guarantee; and it is said that the guarantee was improperly given for the purchase-money of an estate. In truth it was given to recover the banking balance, which was a much larger sum. It is objected that we have not proved in the winding-up; but a claim of this sort is not barred by sect. 158: *In re Trent and Humber Company* (6). At the winding-up there was an existing liability which has since ripened

(1) 10 Ch. D. 450.
(2) Law Rep. 5 Ch. 233.
(3) Law Rep. 5 H. L. 656.
(4) Law Rep. 4 Ch. 376; reversing the decree below, Law Rep. 6 Eq. 112.
(5) 14 Ch. D. 660.
(6) Law Rep. 6 Eq. 396, 400, n.

into a debt: *Barrett's Case* (No. 2) (1). The liquidator has had the benefit of the sums paid by the respondents on guarantee; he ought not to be paid twice over. As to the £259 11*s.*, it was money lent by *Simpson* and *Ramwell*, but the debt is now due to *Ramwell* alone. *Flitcroft* is in the same position to the extent of £200, and also of a sum of £75 paid in discharge of pressing creditors. There is a further sum of £262 10*s.* due to *Flitcroft* on a sub-mortgage. As to *Bardsley*, he claims to a set-off of £100 in respect of a payment made on the guarantee, and £40 paid for the use of the company.

Then there is a claim for a large amount against *Simpson*, who is a bankrupt. If that sum were paid, it would reduce the amount whereby these respondents are liable. In that respect an allowance should be made to them; it is not their fault, but owing to an accident, that *Simpson* has not made any claim.

As to interest, what has happened is too remote a consequence of the directors' acts to induce the Court to charge them with interest.

Horton Smith, Q.C., and *Russell Roberts*, for *Kevan*, the trustee in bankruptcy of *Simpson*:—

We adopt the argument that this claim is for a mere tort; and damages recovered in an action of tort are not provable in a bankruptcy: *Ex parte Brooke* (2). It may be that *Simpson* himself remains personally liable: *Emma Silver Mining Company* v. *Grant* (3).

BACON, V.C., asked for a reply on the 165th section.

Davey, in reply:—

It has not been even argued that these directors were justified in making the payments they have made. The misapplication is admitted. They chose to make out their balance-sheets so as to shew a fictitious profit. That was quite as much a misapplication as if they had paid away the money without any such formality, or thrown it into the sea. They were responsible managers,

(1) 4 D. J. & S. 756. (2) 3 Ch. D. 494.
(3) 17 Ch. D. 122.

C. A. 1882 — FLITCROFT'S CASE.

fiduciary agents; and this was a misappropriation of money with knowledge of the facts, which is clearly within sect. 165 according to the Master of the Rolls' decision in *In re National Funds Assurance Company* (1). There was no question there as to the *bona fides* of the directors. In *Joint Stock Discount Company* v. *Brown* (2) directors were made jointly and severally liable for a breach of trust; and the same principle was acted upon in *Emma Silver Mining Company* v. *Grant* (3). Lord *Westbury* never laid it down that a fiduciary agent could shelter himself from a decree under the *Statute of Limitations*. *Coventry and Dixon's Case* (4) was a plain case of misfeasance by directors in not properly qualifying; fraud or breach of trust was out of the question.

As to the trustee in bankruptcy the summons is wrong, if and so far as it seeks relief against him personally.

As to the set-off, three points are urged; first, that the three are entitled to set off the sums paid by them respectively on their guarantee; secondly, as to sums paid by *Flitcroft* and *Bardsley* respectively to certain creditors; thirdly, as to a sum of £259 11*s*. lent to the company by *Ramwell*, and a sum of £262 10*s*. lent to the company by *Flitcroft*. As to the first, Mr. *Warrington* admits that a separate claim cannot be set off against a joint liability; but he says the liability the liquidator seeks to enforce is several as well as joint. The liquidator then elects to waive the several claim, and to claim jointly only; and that point fails. Independently of that, are these payments sums which they are entitled to recover against the company at all? The guarantee was given to a bank, from which was borrowed a sum of £6600, for the purpose of committing a fraud on the company. As to the second, these sums were paid to certain preferred creditors. The directors are entitled, it may be, to stand in the shoes of those creditors whom they have paid, but that does not entitle them to a set-off. All they can have a right to is to take a dividend with the rest. As to the third, the £259 11*s*. was again a personal claim made at first by *Ramwell* and *Simpson* in partnership, afterwards by *Ramwell* alone, and as before, a personal claim cannot be set off against a joint liability; and as to the £262 10*s*., an alleged

(1) 10 Ch. D. 118.
(2) Law Rep. 8 Eq. 381.
(3) 17 Ch. D. 122.
(4) 14 Ch. D. 660.

mortgage debt, the evidence is unsatisfactory, and if necessary an inquiry should be directed.

BACON, V.C.:—

The case is, no doubt, one of great importance; it puts the 165th section on its trial; and it is necessary to consider with care what the meaning of the Legislature is, as expressed in that section.

One must have regard to the position of directors of a joint stock company. It is said they are not trustees. Answering that objection in general, I should say they are trustees and nothing else. They have interests of their own, but they are trustees of the money which may be collected by subscriptions, and of all the property that may be acquired; they have the direction and management of that property, and at the same time they have incurred direct obligation to the persons who have so intrusted them with their money. What difference there can be in principle between the case of *Burdick* v. *Garrick* (1) and this case I am at a loss to conceive. A man going abroad says to another person: "You take charge, possession, and management of all my property and account to me for it when I come back." What do the subscribers to a joint stock company say? "We select you as directors; we entrust you with all our moneys now paid, and all that we are liable to pay hereafter, and with the management of all our interests, and we look upon you to account to us for them;" and they do account at their general meetings, and by their balance sheets, and so on. That the relationship of trustee and *cestui que trust* subsists between the directors of joint stock companies and the shareholders, I do not entertain the slightest doubt. If I had any doubt it would be removed by reading the 165th section, which applies directly to breaches of trust. [His Lordship read the section.] Having attended with the utmost care to the arguments which have been addressed to me, I repeat I can entertain no doubt, first, that the directors are, in the most general sense, trustees for the company, and next, they are the very persons who are meant, pointed at, and spoken of, in this 165th section.

(1) Law Rep. 5 Ch. 233.

C. A. 1882 FLITCROFT'S CASE. V.-C. B.

Now, the facts of the case are not in the slightest degree in question. This was a company not very successful, but the directors did, on the occasions mentioned in the balance sheets, state to the subscribers what the condition of their property was. They put down among the assets a number of debts which they knew were not good, or at least did not know to be good, treating them as the actual assets of the company; and upon that statement and representation to the shareholders they recommended a dividend which the company approved. They had no means of paying a dividend, they never had any moneys arising except from two sources—one the contributions of the shareholders, the other such money as they might borrow on their own credit. In either case it was capital and capital only, that they had; and they had not the means of paying the dividends, if declared, without resorting to that capital; so that, in the words of the Master of the Rolls in a case which has been referred to (1), they paid back to the shareholders their capital, and of course at the same time paid back to themselves a part of the capital which they had themselves contributed. The case is, in my opinion, upon these grounds, wholly unarguable. Of the several cases which have been referred to, that of *In re National Funds Assurance Company* (2) seems to be the most directly in point. No doubt in *In re Forest of Dean Coal Mining Company* (3), which Mr. *Warrington* cited to me, the Master of the Rolls speaks with great indulgence and forbearance of the character of directors, and declines to carry their liability further than the law requires it should be carried. But the *National Funds Assurance Company's Case* is identical with the present. There the directors were accused of having paid back to the shareholders their capital, that is to say, paid their dividend out of the capital. That is precisely what they have done here. The Master of the Rolls, in terms which I need not repeat, decided that they came clearly within the 165th section, and accordingly, it being admitted that the directors here did misapply moneys of the company, it follows that they have exposed themselves to the consequences of the 165th section.

(1) *In re National Funds Assurance Company*, 10 Ch. D. 118, 126.
(2) 10 Ch. D. 118. (3) 10 Ch. D. 450.

Then it has been gravely argued that because one of the Respondents has become bankrupt, no order can be made against him or his estate, inasmuch as all that he did was to commit a tort. It is no tort whatever; it cannot be called a tort, nor is this an action for damages. If you establish that the man committed a breach of trust you have only to count what is the amount of the liability arising out of that breach of trust, and there is the decree and the order made at once. No inquiry has to be made; no jury to be empannelled; no witnesses have to be examined; nothing is required to be done in order to ascertain who was to blame, as in the case of tort, or whether there are circumstances which take away from the tort its most severe character. The thing is ascertained by itself; it is a breach of trust plainly available against the estate of the bankrupt, as well as against all the others; and considering that a trust has been created, and that the relationship of trustee and *cestui que trust* subsisted between the directors and shareholders, and that it was abused by the directors, there is an end of any question of the *Statute of Limitations*. The *Statute of Limitations* is a very good answer to a mere action of tort; it may be that you cannot prove in bankruptcy unless you have a judgment signed and completed before the bankruptcy. But that has nothing to do with the case before me.

Upon the general substance of the liquidator's summons I think that the demand he makes is perfectly justified, and it is in mere discharge of his duty that he should endeavour to compel payment. "Compel him to repay any moneys so misapplied or retained" is the wording of the statute (not "any damages").

So that all that remains is the consideration of the set-off which is pleaded. Now I cannot properly import into this case, although I cannot forget them, the circumstances relating to the purchase of what is called the *Cheadle Hall* estate; and I cannot shut my eyes to the suspicion that the money which was borrowed and guaranteed was not for the express purpose of paying for that estate. But whether that be so or not is perfectly indifferent, because the demand of the liquidator being against these persons jointly, he has a right to prosecute it also severally, and there can be no right at law to set off several demands against that joint demand, which in my opinion has been thoroughly established.

C. A. 1882 FLITCROFT'S CASE. V.-C. B.

Of the two sums which have been mentioned, one has been proved, and Mr. *Davey* does not require any further order as to that at present. As to the other he is not unwilling that that should be inquired into, to see if there is anything in the circumstance of the mortgage, which has been discharged, which would entitle the person to be charged with that sum to any allowance by way of set-off or otherwise in respect of it. I think the justice of the case in that respect would be met by declaring that the order now to be made is without prejudice to any application which Mr. *Flitcroft* may make respecting the mortgage.

That seems to dispose of this summons excepting only the question of costs. I can make no distinction as to the costs. The assignee in bankruptcy of Mr. *Simpson* had no ground for coming and disputing the right to prove against the estate; this is not the place in which that question must be decided. He has a right if he likes to be present at the taking of the account, if an account has to be taken; but that is the utmost extent of his right. That right he has not attempted to exercise; he has only sat by and disputed everything that has been said. I think I can make no difference in the order that is made against all the Respondents. I think therefore that the order must be, subject to the reservation I have mentioned, in the terms of the summons.

Judgment accordingly, declaring the Respondents to be jointly liable in respect of the dividends declared and paid during their respective tenures of office; interest to be paid at 4 per cent. from the respective dates of payment of the dividends to the date of actual repayment; costs against all the Respondents.

The order was drawn up in the following way: *Simpson* and *Flitcroft* were declared jointly liable for £225 the amount of dividends improperly paid in July, 1873, with interest at £4 per cent., from the time of payment (after deducting a sum which had been paid by *Grundy*, who had entered into a compromise which was sanctioned by the Court). *Simpson*, *Flitcroft*, and *Bardsley* were declared jointly liable for £490, the amount of dividends improperly paid from the 30th of January, 1874, to the 28th of July, 1874, both inclusive, with interest from the time of payment. *Simpson*, *Flitcroft*, *Bardsley*, and *Ramwell* were declared jointly

liable for £2260, the amount of dividends improperly paid from the 26th of January, 1875, to the 29th of January, 1878, inclusive, with interest from the times of payment, and *Simpson*, *Flitcroft*, and *Ramwell* were declared jointly liable for £217, the amount of dividends improperly paid on the 30th of July, 1878, with interest, and payment was ordered accordingly, liberty being given to the liquidator to carry in a proof against the estate of *Simpson* for the moneys due from him under the order. C. A. 1882 FLITCROFT'S CASE. V.-C. B.

J. B. D.

Flitcroft, *Bardsley*, and *Ramwell*, appealed. The appeal was heard on the 26th of July, 1882. C. A.

Warrington, for the Appellants:—

We do not dispute that dividends were paid out of capital, and that the Appellants are subject to some liability. The first point taken by the Appellants was intended to be that they were entitled to a set-off, but after the case of *Pelly, In re Anglo-French Co-operative Society* (1), decided by this Court yesterday after full argument, I cannot contend that directors can set off anything against what is found due from them under sect. 165, though that decision appears to conflict with *Grissell's Case* (2). The only ground, however, on which set-off was disallowed before the Vice-Chancellor was that there could be no set-off of a separate debt against a joint liability, and regard ought to be had to that on the question of costs, if we fail on the other grounds.

The decision on the other part of the case was given against us on the authority of *In re National Funds Assurance Company* (3). But that decision I contend is virtually overruled by *Coventry and Dixon's Case* (4).

[JESSEL, M.R.:—That case merely decided that a person was not liable to be proceeded against under sect. 165 unless he was guilty of some misconduct for which he might have been sued apart from that section.]

I contend that it lays down this principle, that the directors are

(1) *Ante* p. 492.
(2) Law Rep. 1 Ch. 528.
(3) 10 Ch. D. 118.
(4) 14 Ch. D. 660.

C. A. 1882 FLITCROFT'S CASE.

trustees for the company, and for nobody else. If, therefore, the company has debarred itself from complaining of the acts done, there is no liability for them. The proceeding must be treated as an action by the company, and all members of the company have acquiesced by receiving the dividends.

[JESSEL, M.R.:—Your argument would go to this, that if the directors had divided the whole capital among the then shareholders, they would have been under no liability. Have you any authority for such a proposition?]

No direct authority.

[JESSEL, M.R.:—I am not prepared to say that apart from winding-up a creditor might not have a remedy against the directors individually for such a misapplication of assets.]

We admit our liability for what we have put into our own pockets, but we complain of being held liable to pay over again what we have paid to other shareholders. If the company proves solvent, they will get their money twice over. *Coventry and Dixon's Case* (1) decides that sect. 165 creates no new rights.

[JESSEL, M.R.:—But it does not decide that a winding-up creates no new rights.]

This is a proceeding in the nature of an action for tort, and the *Statute of Limitations* applies to all dividends paid to other shareholders more than six years before the application. If it was a breach of trust it was acquiesced in. If it was a tort the *Statute of Limitations* applies. It cannot be treated as a breach of trust, for the shareholders were the only *cestuis que trust*.

[BRETT, L.J.:—Can the *Statute of Limitations* be a bar to any demand under sect. 165?]

I submit that it can where the demand is merely for a tort.

[BRETT, L.J.:—It seems arguable that everything struck at by sect. 165 is in the nature of a breach of trust, but at all events is not a misfeasance by a director a breach of trust?]

Davey, Q.C., and *Ryland*, for the liquidator:—

We dispute the proposition that the company could not apart

(1) 14 Ch. D. 660.

from sect. 165 compel the directors to replace moneys improperly expended. Suppose the company brought an action for the purpose it would be no defence to say that the money had been paid to persons who were shareholders on the register. The persons now on the register may all be different, and acquiescence by a transferor does not bind a transferee who knows nothing about the transaction. *Ashbury Railway Carriage and Iron Company* v. *Riche* (1) laid down nothing new, but is useful to be referred to as laying down distinctly that where an act is *ultrà vires* the company with the consent of all the shareholders will not effectually ratify it.

[COTTON, L.J. :—How can any consent at all be made out. The shareholders had wrong balance-sheets before them.

JESSEL, M.R. :—They assented to payment of dividends out of profits which they were told existed, and how can that be taken to be an assent to payment of dividends out of capital ?]

The decision in *In re National Funds Assurance Company* (2), if correct, decides the present case. The Appellants say that it ought to be reviewed on the ground of *Coventry and Dixon's Case* (3) ; but that case is in no way inconsistent with it. *Evans* v. *Coventry* (4) is undistinguishable from the present case.

[COTTON, L.J. :—Was there not there an agreement in the policies which gave the policy-holders a right to insist that the assets should not be misapplied ?]

It came to nothing more than the ordinary provisions in articles of association that the assets shall be applied for the purposes of the company. Every creditor trusts a company on the faith of the statutory conditions to which the company is subject. No acquiescence whatever by shareholders can be shewn. An astute accountant might perhaps have made out from the balance-sheets that there had in reality been no profits, but an ordinary shareholder could not.

[JESSEL, M.R. :—The directors made an express representation to the shareholders that profits had been made, and the effect of

(1) Law Rep. 7 H. L. 653.
(2) 10 Ch. D. 118.
(3) 14 Ch. D. 660.
(4) 8 D. M. & G. 835.

C. A. 1882 FLITCROFT'S CASE.

that representation cannot be taken away by shewing that documents were laid before the shareholders a thorough investigation of which would have shewn that the representation was untrue, unless it is also shewn that they did investigate them and discover the untruth.]

We say that even if they did discover it, and if every shareholder in the company had acquiesced in the most distinct way in the misapplication of the capital, that would have been no defence. *Society of Practical Knowledge* v. *Abbott* (1) lays down a principle which governs the present case, and shews strongly the difference between a corporation and the aggregate of the individual members of it.

Warrington, in reply:—

A liquidator is merely substituted for the company and has no better right than the company: *Waterhouse* v. *Jamieson* (2).

[COTTON, L.J.:—You admit that the directors must repay what they themselves received. How do you make any distinction between what they retained for their own dividends and what they paid away to other people. There was as much acquiescence by the shareholders in one as in the other.]

JESSEL, M.R.:—

This is an appeal from an order of Vice-Chancellor *Bacon*, that certain directors who had improperly paid dividends to the shareholders out of capital should pay to the liquidator the amount of the sums so paid. The question is whether he had authority to make such an order.

The facts are these. The directors had for several years been in the habit of laying before the meetings of shareholders reports and balance-sheets which were substantially untrue, inasmuch as they included among the assets as good debts a number of debts which they knew to be bad. They thus made it appear that the business had produced profits when in fact it had produced none. The meetings acting on these reports declared dividends which the directors paid. The liquidator has taken out a summons to compel

(1) 2 Beav. 559. (2) Law Rep. 2 H. L., Sc. 29.

the directors to replace the sums so paid, and the Vice-Chancellor, following the decision in *In re National Funds Assurance Company* (1), made the order. Even if he had himself entertained a different view he was not likely to refuse to follow that case, and the object of the present appeal is in fact to have that case overruled. It is said that it is not consistent with *Coventry and Dixon's Case* (2). This latter case decides that under sect. 165 directors cannot be made liable for anything (except perhaps for interest) for which they could not be made liable independently not of the Act, but of that particular section. If then the decision in *In re National Funds Assurance Case* had been founded on some new equity arising under sect. 165, it could not be relied upon. It is not, however, founded on any such equity, but on the law independently of that section, and I entirely adhere to the judgment given in it. A limited company by its memorandum of association declares that its capital is to be applied for the purposes of the business. It cannot reduce its capital except in the manner and with the safeguards provided by statute, and looking at the Act 40 & 41 Vict. c. 26, it clearly is against the intention of the Legislature that any portion of the capital should be returned to the shareholders without the statutory conditions being complied with. A limited company cannot in any other way make a return of capital, the sanction of a general meeting can give no validity to such a proceeding, and even the sanction of every shareholder cannot bring within the powers of the company an act which is not within its powers. If, therefore, the shareholders had all been present at the meetings, and had all known the facts, and had all concurred in declaring the dividends, the payment of the dividends would not be effectually sanctioned. One reason is this—there is a statement that the capital shall be applied for the purposes of the business, and on the faith of that statement, which is sometimes said to be an implied contract with creditors, people dealing with the company give it credit. The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only

(1) 10 Ch. D. 118. (2) 14 Ch. D. 660.

C. A. 1882 — FLITCROFT'S CASE. — Jessel, M.R.

for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he cannot enforce otherwise than by a winding-up order. It follows then that if directors who are *quasi* trustees for the company improperly pay away the assets to the shareholders, they are liable to replace them. It is no answer to say that the shareholders could not compel them to do so. I am of opinion that the company could in its corporate capacity compel them to do so, even if there were no winding-up. They are liable to pay, and none the less liable because the liquidator represents, not only shareholders, but creditors. The body of the shareholders no doubt voted for a declaration of dividend on the faith of the misrepresentation of the directors, so that there really was no ratification at all. It is impossible to say to what extent the company and the shareholders may have been injured by these proceedings. It may be that this reduction of capital has been the cause of the ruin of the company, in which case the shareholders as such may have a right to complain of what has been done. It is not necessary, therefore, to refer to previous decisions to shew the principle on which the directors are held liable. If it be necessary to resort to the doctrine of implied contract *Evans* v. *Coventry* (1) is in point. The order of the Vice-Chancellor will therefore be affirmed, but with this variation, that the directors in each case are to be declared jointly and severally liable and not only jointly liable.

BRETT, L.J.:—

In this case the directors paid away part of the capital of the company for purposes not authorized by the memorandum or the articles of association. I cannot doubt that their doing so was a breach of trust. It is argued that the shareholders by accepting the dividends which were paid out of capital ratified what the directors had done, so that their acts cannot be treated as breaches of trust. I think that there was no ratification at all, because the assent of the shareholders was procured by improper accounts, the untruthfulness of which the shareholders did not know. But suppose they had known it, I think that what was

(1) 8 D. M. & G. 835.

done was a breach of trust which they could not ratify. If they had with full knowledge assumed to ratify what was done, they could not individually have complained, but the shareholders are not the corporation. In my opinion the corporation could at any time before the winding-up have compelled the directors to replace the moneys thus improperly expended, and the liquidator now can do so. Even if the shareholders had all sanctioned what was done, and had remained the same throughout, still the company could have sued the directors for a breach of trust. They are trustees for the company not for the individual shareholders. The liquidator represents the company, and is bound to discharge towards the creditors all the duties which the company owes them. It is therefore his duty when such a breach of trust as this is discovered to get a return of the assets improperly expended that they may be applied in payment of debts. The act of the directors is impeached as a breach of trust, not on the ground of tort or misfeasance. There are persons who may be made liable under sect. 165, without having been guilty of a breach of trust; but where the person charged under that section is a trustee, the act which brings him within the section is a breach of trust. That being so, no Statute of Limitations nor any bar by analogy to the statute can be relied on. The question of set-off is disposed of by our decision of yesterday in *Pelly's Case* (1). Everything that could be urged for the Appellants has been well put, but their case fails.

COTTON, L.J.:—

The first point to be considered is, whether this was a breach of trust and a misapplication of the funds of the company. I am of opinion that it was. The assets of a company are to be dealt with only for the purposes of its business. The application of the capital in paying dividends was therefore a misapplication, and the Court has power under sect. 165 to order a return of the moneys so expended. Several objections to this have been urged. It was contended that though the directors might be ordered to repay what they had themselves retained, they ought not to be ordered to refund what they had paid to the other shareholders. But directors are in the position of trustees, and are liable not

(1) *Ante*, p. 492.

C. A. 1882

FLITCROFT'S CASE.

Cotton, L.J.

only for what they put into their own pockets, but for what they in breach of trust pay to others. Then it was said that general meetings confirmed these payments, and that the shareholders all received the dividends, and that therefore the company, which only consists of the aggregate of shareholders, cannot get them back. I am of opinion that there was no confirmation which could bind the shareholders as individuals, for there can be no effectual confirmation where the parties are under a mistake of fact. Here the directors had issued false returns and balance sheets which made it appear that the company had made a profit, and there is not even an allegation that the shareholders knew *aliunde* that these documents were incorrect. But even if the shareholders had known it they could only bind the company to things which were within the powers of the corporation. Now a payment of dividends out of capital is contrary to the constitution of the company, and is incapable of ratification.

The argument that the money has in fact been received by the company, and that the company cannot get it back, is ingenious but unsound. The corporation is not a mere aggregate of shareholders. If the corporation were suing for the purpose of paying over again to the shareholders what the shareholders had already received the Court would not allow it. But that is not the case here, the company is insolvent, and there is no objection to allowing it to get back its funds for the purpose of paying debts. The case of the liquidator is stronger, for in some respects he, as a *quasi* trustee for creditors as well as shareholders, stands in a different position from the company. But I rely on this, that the money was not paid to the corporation, but was paid improperly to individuals, and the corporation can sue the directors to get it back that it may be applied in payment of the debts of the corporation. I do not see how to make any distinction between what the directors retained and what they paid to other shareholders.

The question of set-off is disposed of by our decision in *Pelly's Case* yesterday, and I should not have referred to it had not *Grissell's Case* (1) been cited as conflicting with it. But that case only related to the question whether directors who were creditors

(1) Law Rep. 1 Ch. 528.

of the company should be postponed to other creditors, which is quite a different question.

The *Statute of Limitations* can in no way apply to a case like the present, for the ground of our decision against the directors is that they have misapplied funds as to which they stood in the position of trustees.

Solicitors for Liquidator: *Clarke, Woodcock, & Ryland.*
Solicitors for Appellants: *Goldring & Mitchell.*
Solicitors for other parties: *Hamlin & Grammer.*

H. C. J.

Ex parte HARPER. *In re* TAIT.

Proof in Bankruptcy—Admission by Trustee—Right to apply to expunge—Lapse of Time—Bankruptcy Rules, 1870, *rr.* 72, 73.

Under rule 73 of the Bankruptcy Rules, 1870, as under the previous practice, a trustee in bankruptcy who has admitted a proof against the estate is entitled at any time afterwards to apply to the Court to expunge the proof, on the ground that it was originally wrongly admitted. Mere lapse of time is no objection to the application, but, though the proof is expunged, the creditor will be entitled to retain any dividend which he may have previously received.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 23rd of December, 1869, Sir *Peter Tait*, *George Cannock*, *Robert Thomas Tait*, and *Balfour Logie*, who carried on in partnership the business of army clothiers and contractors, under the firm of *Tait & Co.*, executed a deed which provided for the winding-up of their affairs under the inspection of certain persons named in the deed. The deed provided that the joint and separate estates of the debtors should be administered as in bankruptcy, and there was a declaration that the deed was intended to be and operate as a deed of inspectorship for the benefit of all the creditors of the debtors within the meaning of the provisions of the 192nd section of the *Bankruptcy Act*, 1861, in that behalf.

George Cannock, one of the debtors, held seventy shares, of the

C. A. 1882

Ex parte HARPER. *In re* TAIT.

nominal value of £20 each, in a company called the *Glamorgan Iron and Coal Company*. The company in February, 1867, resolved on a voluntary winding-up, and on the 2nd of March, 1867, an order was made by the then Vice-Chancellor *Wood*, that the winding-up should be continued subject to the supervision of the Court. *Cannock* was also a creditor of the company, in respect of debentures issued by them to him, for an amount largely exceeding the amount uncalled on his shares.

On the 27th of March, 1871, the solicitors of the inspectors wrote to the liquidator of the company that *Cannock* claimed a large sum as due from the company to him, and on the 1st of April, 1871, they wrote again to the liquidator that "if you consider your company has any claim against Mr. *Cannock's* estate it will be desirable that you should send us a formal notice thereof forthwith." On the 8th of April, 1871, the solicitors of the liquidator wrote to the solicitor of the inspectors informing them that the liquidator had a claim against Mr. *Cannock* "for the amount due upon seventy shares in the company, the whole of which will have to be called up, £630," and another claim for £82. On the 5th of May, 1871, the solicitors of the inspectors wrote to the liquidator's solicitors, "we shall feel obliged if you will forward us the fullest possible particulars as to the liquidator's claims against Mr. *Cannock's* estate." On the 7th of March, 1872, the liquidator sent to the inspectors particulars of his claim, as follows:—

"For amount of call made on the 16th of July, 1866, upon Mr. *Cannock* as a shareholder in the company at £3 per share on seventy £20 shares . . .	£210
"Interest thereon at 5 per cent. from such date to payment	
"Further liability on such shares at £8 per share, which will be required to be paid	560
"Value of horses belonging to the company handed to Mr. *Cannock*	82"

In March, 1872, the inspectors declared and paid a first and final dividend of 20*s.* in the pound on *Cannock's* separate estate. No formal proof had then been sent in by the liquidator, and no dividend was paid to him. Further correspondence took place

between the inspectors' solicitors and the liquidator's solicitors, and ultimately, on the 8th of May, 1879, the inspector gave the liquidator a formal notice that on the 21st of March, 1872, they had declared a first and final dividend of 20s. in the pound on the separate estate of *Cannock*, payable to the creditors who had proved their debts and whose claims had been admitted, adding, "take notice that unless you within twenty-eight days substantiate your claim against the separate estate of the said *George Cannock* the funds in hand and to come to hand will be divided amongst such creditors of the joint estate of the said debtors as have proved their debts and whose claims have been admitted, and that all other persons will be excluded from participation in such funds." On the 14th of May, 1879, the liquidator made a formal affidavit in proof of his claim, in which he stated that *Cannock* was indebted to the company in the amount of £988. This sum was made up of the sums mentioned in the claim of the 7th of March, 1872, and a sum of £136 for interest for thirteen years on the unpaid call of £3 per share made in 1866. Further correspondence then took place, in which the solicitors for the inspectors said that they should require to be satisfied of *Cannock's* liability and of the necessity for calling up the whole of the capital of the company, and requested that the books of the company should be produced for their inspection. Ultimately, on the 14th of May, 1882, the inspectors served the liquidator with a formal notice that they rejected his claim against *Cannock's* separate estate, and that they intended to exclude him from dividend in respect thereof, adding that the ground of rejection was that there were due to *Cannock* from the company at the date of the deed of inspectorship sums largely exceeding the claim of the liquidator, which sums they claimed the right to set off against his claim. The liquidator then applied to the Court for an order that his proof should be admitted. The Registrar ordered it to be admitted for the amount claimed, on the ground that the inspectors had by their delay precluded themselves from rejecting it. He also refused an application, made by the counsel for the inspectors at the hearing of the motion, that, if the proof must be taken to have been admitted, it might be expunged.

The inspectors appealed.

C. A.
1882
Ex parte HARPER.
In re TAIT.

Robinson, Q.C., and *F. Thompson*, for the Appellants:—

The proof ought to be rejected, for there is a right to set off the amount due by the *Glamorgan Company* to *Cannock* on his debentures against the claim of the liquidator in respect of calls on his shares, the winding-up of the company having commenced before the execution of the inspectorship deed: *In re Duckworth* (1). It is said that the Appellants have by their delay precluded themselves from now insisting on this objection to the admission of the proof. But the proof has never been formally admitted, and the trustees have in no way bound themselves to admit it. At any rate, if the proof had been admitted, it was not too late to apply to expunge it.

[They were stopped by the Court.]

J. E. Linklater, for the liquidator:—

The order is in accordance with the settled practice of the Court. The inspectors have accepted the proof. If a trustee in bankruptcy receives a proof, and does nothing more, he is treated as having admitted it: *Ex parte Kemp* (2); *Ex parte Good* (3). The delay here amounts to an admission of the proof. If a creditor expects that he is to receive a dividend, he may alter his position on the faith of that expectation.

[JESSEL, M.R.:—In *Ex parte Kemp* leave was given to the trustee to apply under rule 73 (4) of the Bankruptcy Rules, 1870, to expunge the proof.]

That rule was intended only to cure a slip by the trustee in omitting to send the creditor a formal notice of the rejection of his proof. There has been no slip in the present case.

[JESSEL, M.R.:—Under the old practice a proof might be expunged after the lapse of almost any time. In *Ex parte Wilson* (5) a proof was expunged after five years; in *Ex parte*

(1) Law Rep. 2 Ch. 578.
(2) 42 L. J. (Banky.) 26.
(3) 5 Ch. D. 46.
(4) Rule 73: "If at any time after the admission of any debt by the trustee he shall have reason to believe that such debt has been improperly admitted, he may apply to the Registrar, upon affidavit setting forth the facts, for a day to be appointed for the Court to consider the propriety of expunging the proof or reducing the amount thereof."
(5) 1 M. D. & D. 586.

Soper (1) after seven years. The deed in the present case was executed before the *Bankruptcy Act*, 1869, came into operation, and the question depends, not on the Act or the rules, but on the general practice in bankruptcy.]

The inspectors did not ask to have the proof expunged until after the Registrar had decided against them on the question of admission.

JESSEL, M.R.:—

It is not necessary that we should decide whether what has taken place amounts to an admission of the proof by the inspectors. The Rules of 1870 have no direct bearing on the present case, because the *Bankruptcy Act*, 1869, did not come into operation until after the execution of the deed. But rule 72 requires that the trustee when he rejects any proof or claim by a creditor should do so in writing, and I should desire further time to consider whether we could dispense with the writing or assume that there had been a rejection in writing. But, even if the trustee has admitted a proof, he is still entitled to apply to the Court to expunge it. He may do this "at any time after the admission" of the debt. These are the very words of rule 73, and though that rule does not strictly apply to the present case, it only embodies the old rule of practice in bankruptcy. There was no limit to the time within which a proof might be expunged. In the cases which I have already mentioned the proof was expunged on the ground that its original admission had been wrong. The new rule is in accordance with the old practice. And no injustice can be done, because any dividends which have been already paid are allowed to be retained by the creditor, and the expunging affects only the right to receive future dividends. There is a clear right of set-off in the present case, and the appeal must be allowed.

BRETT, L.J.:—

It is conceded that, if the right steps had been taken, the proof ought not to have been admitted. But it is said that by reason of certain slips by the inspectors the Respondent is entitled to

(1) 2 Mont. & A. 55.

C. A. 1882 *Ex parte* HARPER. *In re* TAIT. Brett, L.J.

retain his proof. I think it is unnecessary to consider on the present occasion what was the real extent of the decision of Lord Justice *Mellish* in *Ex parte Kemp* (1), or the principle on which he acted. I think it may be assumed in the present case that by reason of some omission on the part of the inspectors the proof was originally wrongly admitted. But why should any delay on the part of a trustee in bankruptcy estop him from applying to expunge a proof that ought never to have been admitted? I can see no reason why it should. Why should delay work an estoppel? The cases before the Act of 1869 shew that there was no limit to the time for expunging a proof, and under that Act a rule has been made which adopts the old practice in the largest possible terms. It says that the trustee may apply to expunge "at any time" after the admission of the proof. So that if the trustee had admitted a proof in the most formal way in writing, still he could "at any time" afterwards apply to the Court to expunge it, if he had reason to believe that it had been improperly admitted. If this be so, why can he not apply at any time, when there has been no formal admission of the proof? It seems to me that under the old practice and under the new rule a proof of debt may be expunged at any time, however long, after its admission, if it was originally improperly admitted.

COTTON, L.J.:—

It is admitted that there is a right of set-off, and that, if there was nothing else in the case, the liquidator would have no right to prove. In my opinion it is unnecessary to decide how we should deal with the case on the question of the admission of the proof by the inspectors, because, if it has been admitted, still there is nothing to prevent its being expunged. It cannot be considered that there was any admission of the proof until May, 1879, and proofs were expunged after quite as long an interval of time in the cases which have been referred to. This is enough to decide the present appeal. But it must not be supposed that we hold that there has been any admission of the proof in the present case. I think that in *Ex parte Kemp*, Lord Justice *Mellish* must be taken to have decided only that delay amounts *primâ facie* to

(1) 42 L. J. (Banky.) 26.

admission of a proof. In my opinion there is no ground for not expunging the present Respondent's proof.

C. A. 1882 *Ex parte* HARPER. *In re* TAIT.

JESSEL, M.R.:—

The proof will be expunged, and the appeal will be allowed, with costs.

Solicitors for Appellants: *Simpson & Cullingford.*
Solicitors for Liquidator: *Peacock & Goddard.*

W. L. C.

Ex parte BOLLAND. *In re* ROPER.

C. A. 1882 C. J. B. *June* 26. C. A. *July* 27.

Bill of Sale—Statement of Consideration—Registration—Affidavit of "Attestation"—Explanation by Attesting Solicitor—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.

A mortgage of a leasehold brewery and some chattels was stated to be made in consideration of £2000 paid by the grantee to the grantor "immediately before the execution of these presents." No money was in fact paid by the grantee to the grantor, but the £2000 was the balance due by the grantor to the grantee in respect of the purchase-money of the brewery, which had been assigned by the grantee to the grantor, in consideration of £2500, by a deed executed immediately before the mortgage. Of this sum only £500 was paid by the grantor, it being agreed that the balance of £2000 should be secured by the mortgage:—

Held, that the consideration was truly stated in the mortgage deed, so as to satisfy sect. 8 of the *Bills of Sale Act*, 1878.

It is not necessary that the affidavit filed on the registration of a bill of sale should state that the solicitor who attested the execution of the deed explained the effect of it to the grantor before he executed it.

Decision of *Bacon*, C.J., affirmed.

IN October, 1879, *James Pearson*, being under a contract to purchase a leasehold brewery from *George Booth* for £2500, persuaded *A. W. C. Roper*, who was a young man anxious to commence business as a brewer, to become the purchaser from him at £2750. Of this purchase-money *Roper* was able to pay only £750, of which £250 was to be received by *Pearson* and £500 by *Booth*. On the 22nd of October, 1879, the parties met to complete the transaction and *Roper* paid the £750 in the proportions above-mentioned. Two deeds were then executed, an

C. A. 1882

Ex parte BOLLAND. *In re* ROPER.

assignment and a mortgage. By the first deed *Booth*, at the direction of *Pearson*, whose agreement to purchase from *Booth* was recited, assigned the brewery to *Roper*. This deed was dated the 21st of October, 1879, and was expressed to be made "in consideration of the sum of £2500 to the said *George Booth* now paid by the said *A. W. C. Roper*, by the direction of the said *James Pearson*, and also in consideration of the sum of £250 to the said *James Pearson* at the same time paid by the said *A. W. C. Roper*." Only £500 was in fact then paid by *Roper* to *Booth*, but *Booth* signed a receipt for £2500, and it was arranged that *Roper* should give *Booth* a mortgage of the brewery, and a bill of sale of the stock-in-trade and other personal chattels there belonging to him for £2000, the balance of the purchase-money. This arrangement was carried out by the second deed, which was a mortgage and bill of sale by *Roper* to *Booth* of the brewery and chattels. It was dated the 22nd of October, 1879, and was executed immediately after the assignment. The mortgage deed recited that the mortgagee (*Booth*) had agreed to lend the mortgagor (*Roper*) £2000, on having the repayment thereof with interest secured as thereinafter mentioned. The deed contained an assignment by way of mortgage by *Roper* to *Booth* of the brewery and the chattels, and it was expressed to be made "in consideration of the sum of £2000 to the mortgagor paid by the mortgagee immediately before the execution of these presents."

The receipt clause signed by the mortgagor at the foot of the deed was for "£2000 the consideration money before mentioned to be by him paid to me on the execution hereof."

The attestation clause was as follows:—

"Signed, sealed, and delivered by the before-named *A. W. C. Roper* in my presence, and I say that before the execution of the before written mortgage the effect thereof has been explained to the said *A. W. C. Roper* by me.

(Signed) *C. E. Lake*,
"A solicitor of the Supreme Court of Judicature."

The deed was registered as a bill of sale, the statutory affidavit filed on the registration being made by *Lake*. It stated (*inter alia*), "I was present and did see *A. W. C. Roper*, in the said mort-

gage mentioned, whose name is signed thereto, sign and execute the same on the said 22nd of October, 1879," and that "the name '*C. E. Lake*' set and subscribed as the witness attesting the due execution of the said mortgage is in the proper handwriting of me this deponent, and that I am a solicitor of the Supreme Court of Judicature," but it did not state that before the execution of the deed the effect of it had been explained by the deponent to *Roper*.

On the 7th of August, 1880, *Roper* filed a liquidation petition in the *Liverpool* County Court.

The trustee in the liquidation applied to the Court for a declaration that the bill of sale was void as against him on the grounds (1) that the consideration was not truly stated; (2) that the attesting solicitor had not verified on oath the fact that the effect of the bill of sale had been explained by him to the grantor previously to its execution.

The Judge held that the bill of sale was void as against the trustee on the second ground.

Booth appealed to the Chief Judge.

The appeal was heard on the 26th of June, 1882.

Winslow, Q.C., and *S. Taylor*, for the Appellant, contended that the requirements of the *Bills of Sale Act*, 1878, s. 10, had been literally complied with, and that the mortgage and bill of sale were valid: *Hill* v. *Kirkwood* (1); *Ex parte National Mercantile Bank* (2); *Seal* v. *Claridge* (3); *Ford* v. *Kettle* (4); *Sharpe* v. *Birch* (5).

No decision was given on the question of consideration, but we submit that the case is entirely covered by *Ex parte National Mercantile Bank; Credit Company* v. *Pott* (6); and that the consideration is truly set forth within sect. 8, although no money in fact passed from *Booth* to *Roper* at the time when the bill of sale was given.

Horton Smith, Q.C., and *Walton*, for the trustee:—

The deed does not accurately state the consideration, as it was

(1) 28 W. R. 358.
(2) 15 Ch. D. 42.
(3) 7 Q. B. D. 516.
(4) 9 Q. B. D. 139.
(5) 8 Q. B. D. 111.
(6) 6 Q. B. D. 295.

C. A. 1882

Ex parte BOLLAND. *In re* ROPER.

not true to say that £2000 had been advanced by *Booth* and received by *Roper*. In the cases cited there was a pre-existing debt when the bill of sale was given, but here the creation of the debt and the execution of the bill of sale were simultaneous and part of one and the same transaction. The decision in *Ex parte National Mercantile Bank* (1) has been objected to and largely cut down by the subsequent cases of *Ex parte Firth* (2); *Ex parte Rolph* (3); *Hamilton* v. *Chaine* (4). The affidavit of the attesting solicitor in not stating that the deponent before the execution of the deed explained its effect to *Roper* does not comply with the requirements of the *Bills of Sale Act*, 1878: *Conelly* v. *Steer* (5); *Sharpe* v. *Birch* (6).

BACON, C.J.:—

Two points have been argued. The first is the consideration, which is of vital importance in all bills of sale cases, the object of the Legislature being to protect the creditors against any sham transactions, or any contrivance between debtors and creditors by which the consideration may seem to have passed, but which has not in fact passed, and therefore there is no consideration. The policy of the law requires that the consideration shall be stated. Well, has that requisition been complied with in this case? The debtor and *Booth*, by the intervention of a third person (Mr. *Pearson*) agree on the purchase of certain land and chattels, the debtor agrees to the price and the price is fixed. It is a purchase of the land and moveable property by *Roper* from *Booth*, and he was to pay £2500 to *Booth* for it (the £250 bonus which was to be received by Mr. *Pearson* has nothing whatever to do with it). The conveyance is prepared and executed by the vendor, and the money is due to him. When it is said that this case is distinguished from that of *Ex parte National Mercantile Bank*, because there was a pre-existing debt in that case, I do not agree. *Roper* had not paid a shilling of the £2000; he had not the means of doing so, but procured the means of paying the £2500 by executing a mortgage for £2000, and the consideration was fairly stated.

(1) 15 Ch. D. 42.
(2) 19 Ch. D. 419.
(3) 19 Ch. D. 98.
(4) 7 Q. B. D. 1, 319.
(5) 7 Q. B. D. 520.
(6) 8 Q. B. D. 111.

As I understand the case there was £2500 due from *Roper* (to *Booth*); £500 was paid, and £2000 remained, for which £2000 *Booth* had a lien on the whole property; and although he executed a deed of conveyance he could not be deprived of it. *Roper* desired to possess the property, and he possesses it by means of executing a mortgage for £2000. There is a plain clear consideration clearly stated, just in itself—no sham—no such circumstances as remained on my mind in the case of *Ex parte National Mercantile Bank* (1), where I was overruled by the Court of Appeal. I considered that to be a sham. I think I talked of it as a comedy, and I should not like to withdraw that expression of opinion notwithstanding the handling that the case received in another Court. It has, however, no sort of resemblance to this case. The estate to be sold remains *Booth's* until he gets the mortgage, and the mortgage was consideration for parting with the estate. In my opinion, therefore, there is a perfectly clear consideration, a true, a just, and a lawful consideration clearly and properly expressed in the deed of mortgage.

The other point is on the statute, as to the attestation clause. On that, speaking with great deference of all the decisions referred to, I have no true guide except the words of the Act of Parliament, which for public purposes, that is for the protection of the public, including, of course, creditors as well as others, enacts (sect. 10) that the execution of any bill of sale shall be attested by a solicitor of the Supreme Court. Solicitors of the Supreme Court are officers of the Court; certain responsibilities attach to them, and the Legislature has thought it right in this and other instances to say, we will have those transactions verified by the attestation of a solicitor; and the attestation shall state that before the execution of the bill of sale the effect has been explained to the grantor by the attesting solicitor. Can any one doubt what is the meaning of that? The solicitor, whose presence the Legislature requires, shall attest the deed, and shall moreover certify in his attestation that he has made this explanation. Two totally different and distinct things, two different duties, are to be discharged by the solicitor; one personally belongs to himself and his office, the other might be fulfilled by anybody not a solicitor of the Supreme

(1) 15 Ch. D. 42.

C. A. 1882 *Ex parte* BOLLAND. *In re* ROPER. C. J. B.

Court. But the thing he has to do when he is present at the attestation and necessarily discharges that duty, is that he shall at the same time write down and certify that he has explained the meaning of the instrument to the man who executes it. What does the attesting witness do? Supposing the case that a Frenchman or a Dutchman, who does not know a word of English, was executing a bill of sale and had a solicitor of the Supreme Court who could talk Dutch or French, and another witness, that man's clerk, sitting behind, is he to attest that his master, the solicitor, did tell the grantor in Dutch or French what the effect of the bill of sale was. The man who did explain it to him must certify, at his own peril if he certifies anything that is untrue, that he did tell the grantor in Dutch or French what it was. How could the other attesting witness know it? Where does the statute require him to say anything about it?

[His Lordship after reading sect. 10, sub-sect. 2, continued:—] I put the case just now of a Frenchman or a Dutchman, but supposing it was the case of a labourer, a poor ignorant man called in to be an attesting witness, how could he make an oath that he heard the attesting solicitor explain the effect of the bill of sale to the grantor? It is quite clear that he could not. The Act of Parliament is strict enough, and, in the judgment referred to, one of the learned Judges of the Court of Appeal thought it so strict that almost any mode of getting out of it should be allowed. I do not follow that notion in the slightest degree or concur with it, but I do hold to the strictest performance of the provisions of the Act of Parliament, as being indispensably necessary. I find that here the attestation has been regular, the explanation is certified, the affidavit of the execution and attestation are in strict and proper form. I am therefore unable to concur in the reasons of the learned Judge for deciding against the validity of the bill of sale. I am of opinion that it is a perfectly good bill of sale, and therefore the order of the Court below must be discharged.

F. G. A. W.

C. A. From this decision the trustee appealed.

The appeal was heard on the 27th of July, 1882.

Horton Smith, Q.C., and *Crump*, for the Appellant:—

The consideration is not truly stated in the deed. The £2000 was not paid immediately before the execution of the deed. The transaction was a sham. If money which is stated to be paid to the grantor by the grantee is in fact applied by the direction of the grantor in paying a pre-existing debt due by him to a third party it may be properly stated as paid to him; but not if it is applied in paying a debt due to the grantee himself: *Ex parte National Mercantile Bank* (1); *Ex parte Rolph* (2); *Ex parte Firth* (3).

[JESSEL, M.R.:—In *Ex parte Challinor* (4) the Court did not say that the money must be applied in payment of a debt due by the grantor to a third party.]

The grantee having in the first deed signed a receipt for the whole £2500, there can be no express agreement that the £2000 stated as the consideration for the bill of sale should be applied in paying a pre-existing debt due by the grantor.

[JESSEL, M.R.:—The test is, whether the facts would support a plea of payment of the £2000 at law.]

To hold that the retention by the grantee of a debt due to himself would be a sufficient payment to the grantor would be a great extension of *Credit Company* v. *Pott* (5).

As to the other point, the affidavit filed on the registration ought to shew that there was such an attestation of the deed as is required by sect. 10 (1) of the Act, *i.e.*, that before the execution the effect of the deed was explained to the grantor by the attesting solicitor.

"Attestation" means attestation after explanation. This point was not decided in *Ex parte National Mercantile Bank*.

[JESSEL, M.R.:—We really decided it in *Ford* v. *Kettle* (6).]

Sharpe v. *Birch* (7) is in favour of our contention, though, no doubt, *Ex parte Carter* (8) is against it.

(1) 15 Ch. D. 42.
(2) 19 Ch. D. 98.
(3) 19 Ch. D. 419.
(4) 16 Ch. D. 260.
(5) 6 Q. B. D. 295.
(6) 9 Q. B. D. 139.
(7) 8 Q. B. D. 111.
(8) 12 Ch. D. 908.

C. A.

1882

Ex parte BOLLAND. *In re* ROPER.

Winslow, Q.C., and *S. Taylor*, for *Booth*, were not heard.

JESSEL, M.R.:—

I think that both the points taken are untenable, and that they are covered by previous decision.

As to the first point, the question is what is the meaning of the "consideration" for a deed? All that the Act says is that the bill of sale shall "set forth the consideration" for which it was given. The consideration stated in the present case is "£2000 to the mortgagor paid by the mortgagee immediately before the execution of these presents." The question is, what do these words mean having regard to the facts? The grantor owed the grantee £2000, the balance of £2500 purchase-money for a leasehold brewery. He had paid him £500 in cash, and had given him a bill of sale for the balance, and this was accepted by the grantee in payment. Was this in law a payment of the £2000 to the grantor? I have no doubt that it was, or that it would support a plea of payment in an action. It was quite unnecessary that any one should attend with the £2000 in notes or gold, and that they should then be handed over to the grantee, and handed back by him to the grantor. When a transaction like this is a *bonâ fide* one, it has always been held to amount to payment. *Ex parte Challinor* (1) is an express decision on the point, and it has ever since been recognised as such. It is an express decision that such a mode of payment of a sum stated as the consideration for a bill of sale is a legal payment, and is properly so described in the deed.

As to the other point, the Act requires by sect. 10 (1) that "the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." The word "attestation" is there used for "attestation clause;" the same clause which states the fact of attestation is also to state that the explanation was given. But the explanation is not part of the attestation, it is something prior to the attestation. Then sect. 10 (2) says that an affidavit of the "due execution and attestation" of the bill of sale is to be filed with the Registrar. What is required is an

(1) 16 Ch. D. 260.

affidavit of the fact of attestation, *i.e.*, that the deed was signed, sealed, and delivered by the grantor in the presence of the attesting witness. Therefore, the words of the Act are satisfied by the affidavit which has been made in the present case. It is, however, suggested that the affidavit ought to go on to state that before the execution of the deed its effect was explained to the grantor by the solicitor. The statement of the explanation is, no doubt, to be part of the attestation clause, but the explanation is not part of the attestation. There is no provision in the Act that the affidavit shall state that the explanation was given, and it would be a wholly unnecessary provision, for sect. 10 (2) requires that a copy of the attestation clause shall be filed with the Registrar, and every creditor of the grantor can see it. But this very point has been already decided, for in *Ex parte National Mercantile Bank* (1) it was held that it is unnecessary that the effect of the deed should be actually explained by the attesting solicitor to the grantor, the Act only requiring that the attestation clause should state that the explanation was given. The reason for this was given by Lord Justice *James* when he said (2), "The Legislature thought that they would give to the grantor the protection of a solicitor pledging his word to the fact that he did give the explanation. The protection may not in all cases be an effectual one, but I think it is all which the Legislature meant to give." There is nothing in the Act which requires that the explanation should be actually given, but there would be if the solicitor was required to swear that he had given it. The present argument is totally inconsistent with the decision in *Ex parte National Mercantile Bank.*

BRETT, L.J.:—

That which took place in the present case would be said by any man of business, and would be held in any Court of law, to be a payment of the £2000 to the grantor, so that if it was necessary to plead payment of the £2000 in an action, the plea would be proved by that which actually took place. The transaction is described in the deed in the way in which every man of business and every lawyer would describe it, and therefore the description is true.

(1) 15 Ch. D. 42. (2) 15 Ch. D. 52.

C. A. 1882 *Ex parte* BOLLAND. *In re* ROPER. Brett, L.J.

As to the second point, it appears to me that it is decided by the very words of the Act. It says that the execution of the deed is to be attested by a solicitor, "and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." This cannot refer to something which takes place at the time of attestation; it must refer to something which has taken place previously. It must mean that the "attestation clause" shall state that the explanation was given. How can the explanation be part of the execution? It is given before the execution, and therefore it is not any part of the thing which is to be attested or of the attestation. Then, passing on to sect. 10 (2), the affidavit is to be of the "due execution and attestation" of the deed, that is, an affidavit of the fact of attestation, not of the truth of the clause of attestation. In other words, the affidavit must state that the attesting witness was present when the deed was executed and saw it executed. In order to maintain the Appellant's argument the Act ought to have gone on to say that the affidavit must state that before the execution of the deed its effect was explained by the solicitor to the grantor. This, however, would be adding to the Act. It seems to me on the words of the Act itself that the affidavit is sufficient. I also think that this follows from the decision in *Ex parte National Mercantile Bank* (1).

COTTON, L.J.:—

I think the first point is entirely disposed of by what was said by Lord Justice *James* in *Ex parte Challinor*. He said (2): "Whether the whole of the mortgage money is actually paid by the lender into the hands of the borrower, or whether part of it is with his privity or by his direction employed in the payment of a debt due by him, it is equally in a legal sense paid to him." In the present case the £2000 was, with the privity and by the direction of the mortgagor, employed by the mortgagee in satisfying what was due by the mortgagor to the mortgagee. Of course the debt must be a debt due at the time independently of the mortgage transaction, and the £2000 was such a debt.

As to the other point, the whole argument arises from an inac-

(1) 15 Ch. D. 42. (2) 16 Ch. D. 265.

curate use of language in sect. 10. The word "attestation" is used in sub-sect. 1 as meaning the attestation clause, and in sub-sect. 2 as meaning the fact of attestation—that the deed has been attested by the attesting witness. The only thing required by the Act as to the mode in which the execution of the deed is to be attested is that it is to be attested by a solicitor of the Supreme Court. The explanation is something collateral, which must be done before the deed is executed.

Appeal dismissed with costs.

Solicitor for Appellant: *H. G. Field*, agent for *T. Etty, Liverpool.*

Solicitors for Respondent: *Chester, Mayhew, & Co.*, agents for *T. P. Griffithes, Liverpool.*

W. L. C.

Ex parte PRICE. *In re* ROBERTS.

Court of Bankruptcy—Jurisdiction—Discretion as to exercise—Fraudulent Deed—13 *Eliz. c.* 5 [*Revised Ed. Statutes, vol. i., p.* 627]—*Bankruptcy Act*, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 72.

When the trustee in a bankruptcy which is proceeding in a County Court impeaches a deed executed by the bankrupt as fraudulent under the statute of *Elizabeth*, if the amount at stake is beyond the ordinary jurisdiction of a County Court and serious questions of character are involved, and the person interested under the deed desires that the question should not be tried in the County Court, the Judge ought to decline to exercise the jurisdiction conferred by sect. 72, and ought to leave the matter to be tried in an action in the High Court in the ordinary way.

Ex parte Armitage (1) approved.

ON the 10th of February, 1882, *Thomas Roberts*, a grocer at *Birkenhead*, filed a liquidation petition in the *Birkenhead* County Court. The trustee in the liquidation afterwards applied to the County Court for an order declaring that a deed dated the 8th of September, 1880, whereby the debtor had conveyed to his father, *Hugh Roberts*, in fee, the equity of redemption of a farm called *Ty Mawr* in *Anglesea*, was executed by the debtor with intent to

(1) 17 Ch. D. 13.

C. A. 1882 *Ex parte* PRICE. *In re* ROBERTS.

defeat and delay his creditors, and was fraudulent and void as against the trustee, and directing it to be delivered up to be cancelled. The property was worth about £1450, and it was subject to a mortgage of £1000. The conveyance to the father was expressed to be made in consideration of £100 paid by him to the son. The trustee alleged that this was a sham sale, and that after the execution of the conveyance the son continued to deal with the property as his own. At the hearing before the County Court Judge the solicitor who appeared for the father took the objection that the Court had no jurisdiction to decide the question without the consent of the father, who was a stranger to the bankruptcy, and that the trustee ought to proceed by an action, when the question could be tried by a jury in the ordinary way. The Judge overruled the objection, and upon the evidence he made an order declaring the deed fraudulent and void, and directing that it should be delivered up to be cancelled. The father appealed to the Chief Judge. The appeal was heard on the 3rd of July, 1882.

Yate Lee, for the Appellant:—

The objection as to the exercise of the jurisdiction of the Court was taken in the Court below. I renew it here to-day.

The application to set aside the deed is founded upon serious imputations, and turns upon matters as to which there is a direct conflict of evidence. The objection goes to the root of the Appellant's title to the freehold property in question. The deed was executed more than twelve months before the bankruptcy, so that it cannot be attacked on the ground of its execution having been an act of bankruptcy or a fraudulent preference. Therefore the question involved is not one depending upon the special enactments of the *Bankruptcy Act*; it is a matter involving questions of character, of value of property, and of the rights of parties outside the bankruptcy. The Court will not withdraw a case of this sort from the ordinary tribunals: *Ellis* v. *Silber* (1); *Ex parte Pannell* (2); *Ex parte Harrison* (3).

Kennedy, for the trustee:—

The deed is challenged under the provisions of the 91st section

(1) Law Rep. 8 Ch. 83. (2) 6 Ch. D. 335. (3) 13 Ch. D. 603.

of the *Bankruptcy Act*, 1869. It is a settlement within the terms of that section, which enacts that "settlement" shall for the purposes of the section include "any conveyance or transfer of property." The words of *James*, L.J., directly apply: "When a deed is impugned on the ground that it is void by the operation of the bankrupt law, not on a ground which would have been available to the bankrupt himself, the case is pre-eminently one which the Court of Bankruptcy ought to decide itself, and not to leave to the ordinary tribunals": *Ex parte Brown* (1). The trustee claims by a different title from that of the debtor. The case is thus a proper one to come before the Court of Bankruptcy.

BACON, C.J.:—

In my opinion the questions are not questions arising in bankruptcy, and the trustee has no right to call upon the Appellant to have them tried in this Court.

The order will be discharged; but without costs.

J. B. D.

C. A.

From this decision the trustee appealed. The appeal was heard on the 27th of July, 1882.

Winslow, Q.C., and *F. Thompson*, for the Appellant:—

This is a case in which the Court of Bankruptcy ought to exercise its jurisdiction under sect. 72 of the *Bankruptcy Act*, 1869. The validity of the deed is objected to under sect. 91 of the *Bankruptcy Act*, as well as under the statute 13 Eliz. c. 5.

[JESSEL, M.R., referred to *Ex parte Dickin* (2); *Ex parte Armitage* (3).]

Ex parte Butters (4); *Ex parte Brown* (5). Lord Justice *James*, in the latter case, said (6), "That where, by the operation of the bankrupt law, the trustee claims by a higher and better title than the bankrupt, the matter is one which was intended to be dealt with by the Court of Bankruptcy."

(1) 11 Ch. D. [illegible].
(2) 8 Ch. D. 377.
(3) 17 Ch. D. 13.
(4) 14 Ch. D. 265.
(5) 11 Ch. D. 148.
(6) Ibid. 149.

C. A.
1882
Ex parte PRICE.
In re ROBERTS.

[JESSEL, M.R. :—He does not refer to the case where the trustee has a higher title than the bankrupt, but not by virtue of the bankruptcy law.]

The Court of Bankruptcy has jurisdiction to decide questions arising under the *Statute of Elizabeth*. It is a matter of discretion, and the Judge of the County Court exercised his discretion.

Yate Lee, for the Respondent, was not heard.

JESSEL, M.R. :—

I think that after the decision in *Ex parte Armitage* (1) the law on this point must be taken to be settled. Sect. 72 of the *Bankruptcy Act*, 1869, enables the Court of Bankruptcy to decide "all questions whatsoever, whether of law or fact, arising in any case of bankruptcy" coming within its cognizance, if it is desirable that it should do so. But a discretion is given to the Court whether it will or will not try the case, and the mode in which that discretion ought to be exercised is very fairly pointed out in *Ex parte Armitage*. In that case it was held that a question of character was not proper to be tried in a County Court. In the present case an allegation of gross fraud is made against a father and his son. It is said that they conspired together to make a sham sale to the father of the equity of redemption of property of the son, in order to defraud the creditors of the son. It does not matter under what statute it is sought to set aside the transaction. The allegation is that the property was worth £1450, subject to a mortgage for £1000, and that the father bought it for £100. Property worth nearly £500 is at stake, and questions seriously affecting character are involved. The father is not a bankrupt, and he is not directly amenable to the jurisdiction of the Court of Bankruptcy. He desires that the case should not be tried in the County Court, and says that he should like to have it tried by the ordinary tribunal. He gives various reasons for this. If it is tried in the High Court it will be tried by a Judge of high rank; there will be a jury of twelve men instead of five, and he will be able to have the assistance of a higher class of counsel. Is this an unreasonable objection? Ought we to compel him to submit

(1) 17 Ch. D. 13.

to the jurisdiction of the County Court in a case in which the amount at stake is so much beyond the ordinary jurisdiction of that Court, except in bankruptcy, and in which such serious questions of character arise? The County Court Judge seems to have thought that he had not any discretion in the matter, much less to have exercised any discretion. The objection that the Chief Judge ought not to have interfered with the exercise of discretion by the County Court Judge does not therefore arise. I think that the appeal ought to be dismissed, and that the costs should follow the event. The costs in the County Court and before the Chief Judge will be reserved.

BRETT, L.J.:—

Assuming the objection to the deed to be one which would arise only under the *Statute of Elizabeth*, the Court of Bankruptcy would have jurisdiction to try the question. Therefore, the only ground on which the order of the County Court can be interfered with is that he had a discretion which he did not exercise. I mean to say that, in my view, if the sum in dispute had been small—say under £50—I should have thought we ought not to interfere with the exercise of discretion by the County Court Judge, if he had said that he would try the case himself. In the same way, if a very large sum were at stake in a case arising in a bankruptcy within the district of the *London* Bankruptcy Court, and the Chief Judge had said that he would try the case himself with a jury, I should not have been inclined to interfere. I do not wish to put the case on any different footing from that on which it would have stood if the allegation had been that the deed was void, not under the *Statute of Elizabeth*, but as a fraudulent preference. I think the fact that the question arises under the *Statute of Elizabeth* has some bearing on the exercise of the jurisdiction. But I do not wish to preclude myself from saying that, if the case were one of fraudulent preference, it ought not to be tried in the County Court if the third party objected. But in the present case it cannot be doubted that the charge made is one of personal fraud, and, indeed, the County Court Judge himself has said so. The father objected to have the question of his character and his right to property worth £500 decided in the County Court, not because of any

C. A. 1882 *Ex parte* PRICE. *In re* ROBERTS. Brett, L.J.

personal objection to the Judge, but because he wished to have his rights decided by a jury of twelve of his countrymen under the superintendence of a Judge of the High Court. And there was something more than this. All the witnesses live in *Anglesea*, and he is an Anglesea man, and if the case is tried at the assizes there it will be tried by neighbours of his own who know his character. This is of immense importance to him if he is an honest man, and it would be a very strong thing to deprive him of this right. It seems to me that *Ex parte Armitage* (1) is an authority for saying that, when character is impeached, and the amount at stake is large, the County Court Judge ought to exercise his discretion under sect. 72 by allowing the case to be tried in the ordinary way. If the County Court Judge had exercised any discretion in the present case, I should say that he had exercised it wrongly; but I think he did not exercise his discretion at all.

COTTON, L.J.:—

Sect. 72 gives the Court of Bankruptcy jurisdiction to decide all questions which are necessary for the purpose of ascertaining what is the estate of the bankrupt, and how it ought to be distributed. I think there was jurisdiction to try the present case. But when an objection to the exercise of the jurisdiction is made by a third person who is brought into the Court of Bankruptcy, the Court ought to consider whether, under the circumstances, it is reasonable that the case should be tried by the ordinary tribunals or in the Court of Bankruptcy. It is objected here that the County Court Judge has exercised his discretion, but I think he has not. The objection seems to have been put to him as a question of jurisdiction, not of discretion. The discretion was not exercised until the matter came before the Chief Judge, and, in my opinion, he exercised his discretion rightly in considering the nature of the question and the amount at stake. I by no means say that, if the amount at stake was very small, the trustee ought to be put to the expense of an action. But here a substantial amount is at stake, and there is a distinct charge of fraud. Under such circumstances I think the County Court Judge ought, in the exercise of his discretion, to have entertained the objection, and to have

(1) 17 Ch. D. 13.

left the trustee to have recourse to the ordinary tribunals. The costs in the County Court and before the Chief Judge will be reserved to be dealt with by the County Court Judge. The Respondent must not deal with the property for three months.

Solicitors for Appellant: *W. W. Wynne & Son*, agents for *Masters & Rogers, Liverpool.*

Solicitors for Respondent: *Ullithorne, Currey, & Villiers*, agents for *Louis & Edwards, Ruthin.*

W. L. C.

RIGBY *v.* BENNETT.

[1881 R. 122.]

Implied Grant—Right to Support.

The corporation of *L.* put up a piece of land for sale in lots, the interest acquired by each purchaser being a right to a lease of the lot purchased by him, and he being bound to build upon the lot according to plans to be approved by the corporation. None of the lots were sold, and in July, 1868, the Plaintiff agreed for the purchase of one of the lots by private contract, subject to the original conditions. He furnished plans showing a foundation 10 feet 9 inches deep; but finding the subsoil unsafe he laid his foundation at a depth of 8 feet 3 inches to the knowledge of the corporation, whose officer inspected the operations and made no objections. In June, 1869, the Plaintiff's house was carried to the joists of the ground floor. In August, 1869, the Defendant purchased from the corporation the adjoining lot. In October, 1869, when the Plaintiff's house was nearly finished the corporation granted him his lease. After this the Defendant got his lease, and in 1881, wishing to carry his foundations lower than those of the Plaintiff, excavated to a considerably greater depth and endangered the foundations of the Plaintiff's house:—

Held (affirming the decision of the Vice-Chancellor of *Lancaster*), that the Plaintiff was entitled to restrain the Defendant from excavating so as to let down the Plaintiff's house, for that there was not enough in the special circumstances of the case to take away the right of support from the adjoining lands of the grantor which is implied in a grant of land for the purpose of building.

How the case would have stood if the grants to the Plaintiff and the Defendant had been contemporaneous, or if the right of support claimed would have prevented the corporation from building in a reasonable way on the adjoining lot, *quære.*

IN 1868 the corporation of *Liverpool* advertised a plot of land for sale in lots, subject to conditions of sale. By condition 3 it was

C. A. 1882 RIGBY v. BENNETT.

provided that on the performance of certain conditions by the purchaser he should have a lease for seventy-five years from the 26th of November then next of the lot purchased by him, subject to the special covenant referred to in the conditions, which was as follows: "The existing buildings to be taken down and other buildings erected to the improvement line in accordance with plans and elevations to be approved by, and in all respects to the satisfaction of, the council within two years from date of sale." The property was put up for sale by auction in July, 1868, subject to these conditions, but none of the lots were sold. Afterwards, on the 29th of July, 1868, the Plaintiff entered into an agreement for the purchase of Lot 20 by private contract, subject to the conditions of sale so far as applicable to a sale by private contract.

The Plaintiff after the signature of the agreement took possession and submitted plans to the corporation for his new buildings, which were approved by them in May, 1869. According to these plans the building extended to the edge of the Plaintiff's land on every side, the depth of the foundation from the surface to the bottom of the footings of the walls was to be 10 ft. 9 in., and the footings encroached on the adjoining Lots 19 and 21 which remained the property of the corporation. The Plaintiff then pulled down the old buildings on the lot and began excavating his foundations, but found that owing to the nature of the subsoil it was desirable not to go so deep as 10 ft. 9 in. He accordingly excavated only to the depth of 8 ft. 3 in. and laid his foundation at that depth, as was known to an officer of the corporation who supervised the excavation, and no objection was made on their behalf to his not going deeper. The Plaintiff proceeded with the erection of his building, and before the middle of June, 1869, it had been carried up to the joists of the ground floor.

On the 3rd of August, 1869, the Defendant *Bennett* purchased on lease for seventy-five years from the corporation the lot numbered 19, and about the same time a Mr. *Gibbons* made a similar purchase of Lot 21, and the Defendant *Bennett* subsequently acquired it from him.

On the 9th of October, 1869, at which time the Plaintiff's buildings were nearly finished, the corporation granted him his

lease. By this lease, which was framed on the footing of the property being in the same state as it was in July, 1868, the Plaintiff was made to covenant that he would on or before the 27th of July, 1870, pull down the buildings standing on the land, and in lieu thereof erect and build up to the improvement lines as shewn upon a plan a building or buildings of greater value than the land according to such plan, as well as to height and elevation of buildings and otherwise as should be submitted by him to and be required and approved of by the council of the borough.

Bennett obtained a lease of Lot 19 in October, 1872, and a lease of Lot 21 in December, 1876, and on the 4th of March, 1879, a renewed lease of both lots, but did not commence operations till 1881. He wished to carry his foundations lower than those of the Plaintiff in order to get better cellars. In doing this he came to running sand, and in order to get to a good bottom was obliged to excavate to a depth considerably greater. He complained of the footings of the Plaintiff's buildings projecting into his ground, and the Plaintiff thereupon cut them off, but the Court came to the conclusion on the evidence that this did not affect the stability of the Plaintiff's building, as the footings had been set in cement and the whole erection had become consolidated. In the course of the excavation it became clear that the stability of the Plaintiff's building was endangered, and the Defendant's architect wrote to the Plaintiff calling upon him to secure his wall by underpinning it. The Plaintiff offered to share the expense of underpinning, but considered that he had a right to support and refused to bear the whole expense. The Defendant insisted that the Plaintiff must bear the whole expense, and thereupon the Plaintiff, on the 15th of July, 1881, commenced his action asking for a declaration that he was entitled to such subjacent, adjacent, and lateral support from the Defendant's land as might be necessary for the support of the Plaintiff's land and for the support and preservation of the building erected thereon, for an injunction against excavating on the Defendant's land so as to interfere with the Plaintiff's right to support, and for damages.

An interim order was made by arrangement in the action that the Defendant should underpin the Plaintiff's wall without

C. A. 1882 RIGBY v. BENNETT.

prejudice to the question who was liable for the expense. The wall was accordingly underpinned by the Defendant at a cost of £246 13*s.* 4*d.* And it was not in dispute that the Plaintiff's building was thus made perfectly safe.

The action came on for trial before Vice-Chancellor *Bristowe*, and on the 4th of March, 1882, judgment was given declaring the Plaintiff entitled to such support as he claimed, and ordering the Defendant to pay the costs of the underpinning so far as he had not already paid them, and to pay the Plaintiff's costs of the action.

The Defendant appealed.

Robinson, Q.C., and *Neville*, for the Appellant :—

No right of support was given to the Plaintiff by express grant, his right, if any, must be derived from the principle that a grantor cannot derogate from his own grant. But the laying out of this ground in lots was part of a general building scheme, and though the lots were not sold at the same time the grants of them must be considered practically to be cotemporaneous. It would be inconsistent with the nature of the transaction that the Plaintiff should have rights which would prevent the purchasers of the other lots from carrying out the scheme by building on their lots. The covenants with the corporation to erect buildings cannot be considered to affect the rights of the purchasers *inter se*, they are only stipulations for the benefit of the corporation. In no case can a grant of land be considered to carry with it rights which would prevent the grantor from using the rest of the land for purposes for which the grantee knew that it was going to be used. A grantee does not acquire in the absence of express grant rights which will prevent the grantor from making the ordinary use of the remaining land: *Popplewell* v. *Hodkinson* (1). The Plaintiff did not build according to the plans submitted to and approved by the corporation, and there was no assent to his departure from them which would bind the corporation. That departure has done all the mischief, if the Plaintiff had excavated to the proper depth we could also have done so without endangering his building.

(1) Law Rep. 4 Ex. 248.

Davey, Q.C., and *Snow*, for the Plaintiff:—

The contention of the Appellant in fact is that when the corporation let the Plaintiff's land to him for building, they reserved a right of doing on their remaining land acts which would let down his building. *Caledonian Railway Company* v. *Sprot* (1) shews that there was an express grant to the Plaintiff of what was necessary for the support of his building.

[COTTON, L.J.:—No; only an implied grant, and the question is whether, under the circumstances of this case, the implication arises.]

The grant carried with it a right to all reasonable subjacent and adjacent support as necessarily connected with the subject-matter of the grant, and in *Caledonian Railway Company* v. *Sprot* (2) the Lord Chancellor says: "If the grant is made expressly to enable the grantee to build his house on the land granted then there is an implied warranty of support subjacent and adjacent as if the house had already existed." The right is a legal right as if expressed in the grant.

[JESSEL, M.R.:—What the Appellant says is, that if a man grants fifty building leases at the same time, he does not grant to each the same measure of support as if his lease were an independent transaction.]

The leases are not cotemporaneous in this case: the Plaintiff is prior, and we are within *Caledonian Railway Company* v. *Sprot*, which is recognised in *Dalton* v. *Angus* (3). The effect of the grant cannot be controlled by cotemporaneous circumstances, and those who seek to cut it down must make out their case. *Popplewell* v. *Hodkinson* (4) is cited for the proposition that a grantor impliedly reserves a right to use his own land for ordinary purposes, though such user may be injurious to the grantee, but it was never intended in that case to lay down such a proposition, it was only decided that the grantor might drain his own land, though that might take away support.

[JESSEL, M.R.:—Where is the distinction. A man generally

(1) 2 Macq. 449.
(2) Ibid. 451.
(3) 6 App. Cas. 740.
(4) Law Rep. 4 Ex. 248.

C. A. 1882 RIGBY v. BENNETT.

may drain his own land and may make excavations on his own land, but if he is debarred from doing one to the prejudice of the grantee, why may he do the other?]

The distinction appears to be founded on the rule in *Chasemore* v. *Richards* (1), that there is no right in underground water not flowing in a defined channel. *Wheeldon* v. *Burrows* (2) lays down (3) the principles applicable to implied grant, and meets the argument founded on fifty lots being sold at once.

[JESSEL, M.R., referred to *Allen* v. *Taylor* (4) as to cotemporaneous conveyances.]

According to *Swansborough* v. *Coventry* (5) each grantee is in the same position as if his had been the first grant, and in the absence of express reservation there is no implied reservation to the grantor except of a way of necessity. We could follow the argument on the other side if the grants in the present case had been cotemporaneous: *Elliot* v. *North Eastern Railway Company* (6) is explained in *Great Western Railway Company* v. *Bennett* (7). The Appellant says the Plaintiff ought to have built according to his plans, but he built to the satisfaction of the corporation, and when the Defendant took his contract our house had been built above the level of the ground. The Appellant contends for a reservation to the corporation of a right to build on his land a building of a particular character, but it could at most be a reservation of nothing more than a right to erect such buildings as might reasonably be expected to be built on the Defendant's land, and there is nothing in the existence of the Plaintiff's building with a right of support that can prevent his doing so.

Robinson, in reply.

JESSEL, M.R.:—

This is an appeal from a decision of the Vice-Chancellor of the county palatine of *Lancaster*, and it raises some points which deserve consideration.

(1) 7 H. L. C. 349. 3 Jur. N.S. 984
(2) 12 Ch. D. 31.
(3) Ibid. 49.
(4) 16 Ch. D. 355.
(5) 9 Bing. 305.
(6) 10 H. L. C. 333. 6 Jur. N.S. 555
(7) Law Rep. 2 H. L. 27.

The Plaintiff bought from the corporation of *Liverpool*, by private contract, the right to a lease of some building ground. It appears that, before selling to the Plaintiff, the corporation of *Liverpool* had put up for sale by auction the right to leases of a great number of lots of building land contiguous to one another and including the Plaintiff's land, but no sale was effected at the auction. Afterwards, in July, 1868, the Plaintiff bought a contract for a lease of seventy-five years, entering into an obligation to put up a building to the satisfaction of the corporation. At that time the corporation had not sold the adjoining lot, and they remained the owners of it till August, 1869, when they agreed for the sale of it to the Defendant. I mention these dates at the outset, for I cannot look upon the two transactions which took place at an interval of a year and a month from each other as cotemporaneous transactions.

That being the position of the Plaintiff, he put up a house on the land he so bought, laying the foundations at a depth of 8 ft. 3 in. below the surface. The plans shewn to the corporation surveyor shewed the foundations as 10 ft. 9 in. deep, but he did in fact lay them at a depth of 8ft. 3 in., because it was found that if he went deeper there was danger of getting into wet sand, which would have made an insecure foundation. He put footings to his wall on both sides of the wall, and the wall being at the edge of his own land the outer footings encroached upon the land retained by the corporation. It appears that on the 18th of June, 1869, the Plaintiff's house had got up to the joists of the first floor, and on the 3rd of August it was higher, but how much higher does not clearly appear. In October, 1869, when the Plaintiff's house was nearly finished, the corporation granted him a lease of the land in a form which does no credit to the conveyancing draftsman who was employed, for it contains a covenant by the Plaintiff to remove the buildings then on the land and to put up new buildings, although the buildings which it was intended that the Plaintiff should remove had in fact been long since removed, and the new building which he was bound to erect was in course of erection and nearly finished. However, any difficulty arising from that is got rid of by the corporation having stated themselves satisfied that the covenants had been performed.

C. A. 1882 RIGBY v. BENNETT. Jessel, M.R.

The legal effect of that lease was to grant to the Plaintiff the land with so much of the house as was then upon it.

After that, in the year 1881, the Defendant began to build, and in digging the foundation for his building, which he intended to be a building with deeper cellars than those of the Plaintiff, he found that below the level of the Plaintiff's foundation there was a black running sand and some peat, upon which he could not safely lay his foundation, and he was compelled to carry it very much deeper into the clay below. In doing this (after an episode to which I need hardly refer as to the cutting away of so much of the Plaintiff's footings as went into the Defendant's land) he of course got below the Plaintiff's footings; he sapped the foundations of the Plaintiff's house, and to prevent its falling it was necessary to underpin the wall. The Plaintiff brought this action, in the course of which it was arranged that the Defendant should underpin the Plaintiff's wall, without prejudice to any question. It is admitted that the underpinning prevented the possibility of any damage being done to the Plaintiff's house by the Defendant's operations, so that in substance the only question between the parties was whether the Defendant was liable to pay the expense of the underpinning and the costs of the action. The Vice-Chancellor decided that he was, and the Defendant has appealed.

The Defendant says that the Plaintiff has no right to support from the Defendant's land either by prescription or by reason of the grant or demise of the house to him by the corporation, which was then the owner of the land bought by the Defendant as well as of the land leased to the Plaintiff. The real question between the parties is whether that is correct in law.

The Plaintiff puts his case in this way. He says: "I contracted to put up a house to the satisfaction of the corporation. I was entitled to build to the boundary of my land, and I was entitled to build my house in any reasonable way provided it was built to their satisfaction. I did build the house in a reasonable way: I did put it up to the boundary of the land; the corporation were satisfied with it, and they were satisfied even before the Defendant had any contract at all. That alone would give me the right I claim, but, moreover, the legal demise from the corporation to me gives me the right to support for that house." As I understand

the evidence the Plaintiff, when he took his lease, had no notice of the contract entered into by the corporation with the Defendant. The fact, however, is, as I said before, that the Plaintiff's house was completed *quoad* the foundation and up to the first floor before the contract with the Defendant, and of course if the corporation knew of the mode in which the Plaintiff had laid his foundations and approved of it, and did anything at all to bind them to such approval before the Defendant's contract, it is immaterial whether or not the Plaintiff had notice of that contract when his lease was granted.

If the corporation had granted a lease of land on which a house was to be built, and it was built in a reasonable manner, it appears to me impossible to say that they could afterwards be entitled to let the land down by dealing with the adjacent land belonging to them. If, again, they granted the house to the Plaintiff as it then stood, or granted the land on which the house was standing, they granted with it, if I may say so, the easement or the implied obligation or warranty that the house should not be let down by anything done on their adjoining land. It is suggested that though that would be so in an ordinary case yet it was not so in this case, because the Plaintiff knew that the corporation were going to use the adjoining land as building land, and that, therefore, the case is an exception from the general rule that the grantor, who wishes to retain to himself any right of derogating from his grant, must reserve it in express terms. No doubt there are some exceptions. One exception is where two houses or a house and land are sold cotemporaneously, and the lights of the house are not allowed to be interfered with by the purchaser of the other house or of the adjoining land. Whether there would be such an exception if the land were sold for building, and it was impossible to build at all without interfering with the lights, it is not necessary now to consider, because in my opinion such a right of support as the Plaintiff claims would not prevent the corporation or their lessee from building with reasonable convenience on the adjoining land. The point, therefore, does not arise in that way, nor does it arise on account of the contracts being simultaneous, for the interval of thirteen months is too great to allow them to be treated as being simultaneous. Therefore, there does

C. A. 1882 RIGBY v. BENNETT. Jessel, M.R.

not appear to me to be any ground for the exception, and if it depended on legal right it seems to me the demise to the Plaintiff would confer upon him a right to say as against the Defendant and against the corporation, You shall not by excavation let down the walls of my house.

Now passing away from the ground of the right conferred by the legal demise, which may or may not be affected with the question of notice to the Plaintiff of the contract of the Defendant, how does the matter stand independently of it? At the time of the contract with the Defendant the Plaintiff's foundations had been laid, and I do not think that there is any evidence of dissatisfaction by the corporation, I think there is evidence of knowledge by the corporation not merely that the foundations were in, but that they were actually supplemented if I may say so by footings on the outer side of the wall. It is not necessary to decide in this case that they assented to the footings, but I think they did. [His Lordship here adverted to the evidence as shewing that the surveyor of the corporation had notice from the plans as to the way in which the foundations were put in.] But I think independently of this, that as the corporation had stipulated that the building was to be erected to their satisfaction, and had a surveyor going and frequently looking at it, as they certainly had, they could not allow the building to go on without intimating dissatisfaction, and then afterwards turn round and say that they were not satisfied. It does not appear to me, therefore, that at the time when they entered into the contract with the Defendant they were at liberty to say that they would pull down the Plaintiff's house or pull up the foundations. I think consequently that quite independently of the case that the Plaintiff had no notice of the Defendant's contract when he took a lease conferring on him a legal right, he was entitled to say, "As between me and my landlord that house must remain as it is." It seems to me, looking at the case in every point of view, that it is quite impossible for the Defendant to be in a better position than the corporation, and that as the corporation could not have excavated the ground so as to let down the Plaintiff's house neither can the Defendant. In my opinion, therefore, the judgment of the Vice-Chancellor ought to be affirmed.

COTTON, L.J. :—

In this case the Plaintiff obtained a lease or grant of land from the corporation of *Liverpool* for the purpose of having a house built upon it, and the house which he has built upon it has been injured by operations carried on by the Defendant in land which he claims from the corporation. The question is whether the Plaintiff is entitled to recover.

The Plaintiff makes this case, "I took this grant of land for the purpose of building a house upon it" (I will take it in that way at first), "and I rely on the principle that in such a grant there is an implied obligation on the part of the grantor that he will not derogate from his own grant, that he will not deal with his adjoining property so as to destroy the house which he intended I should build on the land when he granted it to me." Undoubtedly as a general rule that is the implied obligation. Lord *Cranworth* thus expressed it in *Caledonian Railway Company* v. *Sprot* (1), "If I am right, which I cannot doubt, in saying that by his conveyance Mr. *Sprot* conveyed to the company not only the land to be covered by the railway, but also by implication the right to all necessary support, then he cannot by reason of his having reserved the mines derogate from his own conveyance by removing that support." That I think was hardly contested by the Appellant, but it was urged on his behalf that under the special circumstances of this case the Plaintiff has no such right. Now it is observed that according to Lord *Cranworth* this is a case of an implied grant or, which I think probably would be the more correct expression, an implied obligation, and as it is only an implied obligation it may, in my opinion, be modified or restricted by circumstances known both to the grantor and to the grantee at the time of the grant.

Then comes the question, What is the limitation or restriction of the obligation in the present case? It is not necessary in my opinion to consider what would be the consequence of two cotemporaneous transactions. It is not necessary in my opinion to consider what would be the consequence if the grantee knew that the grantor intended to use the adjoining land for a particular purpose, and the right claimed by the grantee was inconsistent with

(1) 2 Macq. 461.

C. A. 1882 RIGBY v. BENNETT. Cotton, L.J.

that purpose. That question may hereafter arise, and I give no opinion upon it. But in the present case it is not in evidence, and in my opinion it is not the proper result of the evidence, that the corporation could not have built in a reasonable way on the land which remained in their possession after they had made the grant to the Plaintiff, without interfering with the support of the Plaintiff's house. If that be so, if the corporation could have built upon their land with a reasonable degree of convenience without depriving the Plaintiff's house of necessary support, can the qualification of the implied obligation not to deprive the grantee of the support he requires be carried further than this, that the corporation do not bind themselves so far as to prevent themselves from building in a reasonable way on the adjoining land? I think that question arises, because although the transactions were not contemporaneous, still in the very lease that was made to the Plaintiff there was an intimation that the corporation intended to carry out improvements by building on the land adjoining to that which was granted to the Plaintiff, there being a reference to a building line up to which the buildings were to be erected. If then it had been shewn that the corporation could not build in a reasonable way on the adjoining land up to that line without interfering with such right to support as the Plaintiff claims, the question would have been a different one, but as this is not the result of the evidence the Defendant cannot, in my opinion, deprive the Plaintiff of the support which might have been left to the Plaintiff's building by building in another and different way from that which the Defendant has adopted. It is very true that the existing house of the Defendant could not have been built as it was without bringing down the house of the Plaintiff, but there was nothing in any way to indicate to the Plaintiff that the corporation intended to build in this way on the adjoining land. In my opinion there is no ground for limiting the implied obligation under which the corporation granted to the Plaintiff by saying that the Defendant is at liberty in consequence of any limitation of the obligation to proceed as he has done, and by the special and peculiar character of his building and foundations to bring down the Plaintiff's house. In my opinion the decision appealed from is right.

JESSEL, M.R.:—

C. A.
1882
RIGBY
v.
BENNETT.

Lord Justice *Brett*, who has left the Court since the close of the argument, desires me to say he concurs. The appeal will be dismissed with costs.

Solicitors for Plaintiff: *Walker, Son, & Field*, agents for *Field & Weightman, Liverpool.*

Solicitors for Defendant: *Gregory & Co.*, agents for *Frodsham & Nicholson, Liverpool.*

H. C. J.

TEMPEST *v.* LORD CAMOYS.

C. A.
1882
CHITTY, J.
July 11.
C. A.
Aug. 1.

[1865 T. 155.]

Will—Settlement—Power of purchasing Real Estate—Power of mortgaging—Jurisdiction of Court to interfere with Discretion of Trustees.

Where absolute discretion has been given to trustees as to the exercise of a power the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly or unreasonably.

Where the power is coupled with a trust or duty the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it.

A testator gave his trustees a power to be exercised at their absolute discretion of selling real estates, with a declaration that the proceeds should be applied, at the like discretion, in the purchase of other real estates. He also gave them power at their absolute discretion to raise money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, and a sum of money, the proceeds of the sale of real estate, having been paid into Court, one of the trustees proposed to purchase a large estate and to apply the fund in Court in part payment of the purchase-money, and to raise the remainder of the purchase-money by mortgage of the purchased estate. The other trustee refused to concur in the purchase:—

Held (affirming the decree of *Chitty*, J.), that the Court could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mortgage for the proposed purpose.

SIR CHARLES ROBERT TEMPEST by his will, dated the 25th of March, 1863, devised several estates of large value to the

C. A. 1882 TEMPEST v. LORD CAMOYS.

use of the Hon. *T. E. Stonor* and Mr. *J. Fleming* for a term of 1000 years, and subject thereto to the use of the first and other sons of his nephew Sir *Charles Henry Tempest* successively in tail male, with remainder to the use of *Arthur Cecil Tempest* for life, with remainder to his first and other sons in tail, with remainders over. The trusts of the term of 1000 years were declared to be, among other things, out of the rents and profits of the real estates to pay certain annuities and to accumulate a portion thereof during the life of Sir *C. H. Tempest* and for twenty-one years afterwards, or until his eldest son should attain twenty-one, and to hold the accumulations upon trust to make certain payments thereout, and subject thereto upon the trusts thereinafter declared of the moneys to arise from any sale or exchange under the powers for those purposes therein contained. And the testator empowered the trustees of the term of 1000 years during the period of accumulation in exercise of their absolute discretion to raise any money which they might think proper, for the purpose of effecting any purchase they might, in the exercise of their absolute discretion think proper, of any lands or hereditaments in *Yorkshire* or *Lincolnshire*, by mortgage of any of the hereditaments thereby devised. And he further empowered the trustees of the said term of 1000 years during the same period, at their own discretion, to sell the hereditaments thereby settled or any part thereof, and he declared that the said trustees should, at such discretion as aforesaid, lay out the money to be received for any such sale as aforesaid in the purchase of other hereditaments in fee simple in possession in *England* or *Wales*.

Mr. *James Fleming* and Mr. *Wilfred Tempest* were the present trustees of the term of 1000 years.

Sir *Charles H. Tempest* had a son who was under the age of twenty-one.

Various portions of the freehold estates had been sold under the above-mentioned power, and a sum of £13,223 was in Court representing the proceeds of such sales, and there was also a sum of £21,916, representing accumulations of the rents of the settled estates.

Some of the family were desirous of purchasing a mansion called *Bracewell Hall*, with the surrounding lands, in the *West*

Riding of *Yorkshire*, for £60,000; and it was proposed to apply £30,000 out of the fund in Court, and to raise the remaining £30,000 by mortgage of the purchased estate.

Mr. *Wilfred Tempest* one of the trustees approved of the scheme but Mr. *Fleming* the other trustee refused to concur.

A petition was therefore presented by *Arthur Cecil Tempest* and *Wilfred Tempest* praying that the purchase might be carried into effect.

It appeared from the evidence that *Bracewell Hall* had been in the possession of the elder branch of the *Tempest* family from the time of *Henry* I. to the year 1657, when it was alienated by the then owner, and it was contended that it was desirable to take advantage of the opportunity of recovering at a moderate price an estate which had been so long in the family.

On the other hand it was objected by Mr. *Fleming* that it was not a prudent exercise of the power of purchasing real estate, and that the testator never contemplated a purchase of such magnitude; and further, that it was not a proper exercise of the trustee's power of mortgaging to raise money for a purchase of this nature.

The petition was heard before Mr. Justice *Chitty* on the 11th of July, 1882.

Ince Q.C., and *Henderson*, for the Petitioners.

Dryden, for other members of the family who supported the petition.

Romer, Q.C., and *Smart*, for Mr. *Fleming*.

CHITTY, J.:—

In this case it is proposed to purchase an estate in *Yorkshire* for a sum of £60,000, allowing £30,000 of the purchase-money to remain on mortgage. The right to make the purchase depends on a power which is contained in the testator's will, which is in these terms:—[His Lordship read the power to purchase freehold estates stated above, and proceeded:]

The question before me is this. The trustees have a power exercisable in their absolute discretion. The term "absolute

C. A. 1882 TEMPEST v. LORD CAMOYS. Chitty, J.

discretion" occurs twice; and one of the trustees for reasons which have not been stated to me at length, but for reasons which I cannot say on the face of them shew a want of good faith on his part, declines to exercise the power. The only power the Court has of effecting the purchase is by the exercise, or by directing the exercise, of this power which I have read. Is there any authority for the Court to compel the trustees in any case to exercise the power against their will? The two trustees differ in opinion. Each says he is entitled to his own opinion, and Mr. *Fleming*, whether he has any other motive or not I do not stay to inquire, declines to exercise the power.

Now the question of a power, which to my mind is similar for all material purposes to the one which I have to construe, was dealt with by the House of Lords in the case of *Gisborne* v. *Gisborne* (1). The words there were, according to the statement (2), "Upon trust that my trustees in their discretion, and of their uncontrollable authority, pay and apply the whole or a portion of the income" to certain purposes; and Lord *Cairns* in his speech, addressing the House of Lords (3), says: "My Lords, larger words than those it appears to me, it would be impossible to introduce into a will. The trustees are not merely to have discretion, but they are to have 'uncontrollable,' that is uncontrolled, 'authority.' Their discretion and authority, always supposing that there is no *mala fides* with regard to its exercise, is to be without any check or control from any superior tribunal." The words in the will are "uncontrollable authority," but it is to be observed that both the Court of Appeal and the House of Lords in the decree varied the expression by using the words "the trustees have an absolute discretion." The result is this, although I do not think this argument is really needed, upon construing the will the Court of Appeal and the House of Lords put in the very term "absolute" in lieu of the term "uncontrollable," to express the meaning of the decision at which they arrived—the very term which we have in this will. Without the assistance of this judgment, I should have said that "absolute" does mean without any conditions, without any check, and without any control.

(1) 2 App. Cas. 300. (2) 2 App. Cas. 302.
(3) 2 App. Cas. 305.

The result therefore is that I should not be at liberty to control the exercise of this power, if the trustees proposed jointly to exercise it, unless I saw that there was a case of bad faith, which I say on these facts cannot be maintained before me. And it is impossible for me to hold that I have in those circumstances any right to direct the trustees to exercise this power which is in their absolute discretion. Where one trustee refuses or declines to exercise the power, the power cannot be exercised at all, and that is the effect of the decision of Vice-Chancellor *Malins* in the case of *Marquis Camden* v. *Murray* (1). I may mention that in a case that came before the Court of Appeal consisting of Lord *Selborne* the late Lord Justice *James*, and Lord Justice *Mellish*, *Brophy* v. *Bellamy* (2), the question arose with reference to the uncontrolled power which the trustees had of paying or applying the whole income which certain infants were entitled to, if the trustees should think fit, notwithstanding the father of the children should be living and able to maintain them; and the trustees proposed to exercise that power which was expressed to be discretionary, and the Court of Appeal declined to interfere with the exercise of the power. That is I will not say a strong case, but it is a case which shews that the Court would not even control the exercise of the power of the trustees after a decree, although I think I am right in stating that when the case came first before Lord *Selborne*, who was sitting alone, he was disposed to put some check on the exercise of the power, and in fact doubted whether he ought to allow the trustees to exercise it.

The case of *Bethell* v. *Abraham* (3) before the present Master of the Rolls is in no sense inconsistent with the conclusion at which I have arrived. The Master of the Rolls considered there that the trustees who were proposing to exercise the power which they had were proposing to make investments which in the eye of the Court, to use his expression, were considered to be speculative, and he said that the Court would not allow investments to be made unless the Court was satisfied of their safety.

It is suggested that there is a distinction between this case and the case of *Gisborne* v. *Gisborne* (4), which is pointed out in an

(1) 16 Ch. D. 161.
(2) Law Rep. 8 Ch. 798.
(3) Law Rep. 17 Eq. 24.
(4) 2 App. Cas. 300.

C. A. 1882 TEMPEST v. LORD CAMOYS. Chitty, J.

interlocutory observation of the Master of the Rolls in the case I have referred to, but I think, as far as the question before me is concerned, that the principle of the decision in *Gisborne* v. *Gisborne* (1) applies, and that I have no authority in the present circumstances to control or to direct the trustees to exercise, the power which they have. The result is that without going into the question of the advantage or disadvantage of the purchase, I decline to accede to the prayer of the petition.

C. A.

From this decision the Petitioners appealed. The appeal was heard on the 1st of August, 1882.

Ince, Q.C., and *Henderson*, for the Appellants:—

All the family except Mr. *Fleming* are anxious for the purchase to be completed. The Court has jurisdiction to control trustees in the exercise of their powers, especially when the powers relate to the management of real estates. The Court has already exercised its jurisdiction controlling the exercise of the trustees' power of leasing in this very will (2). If trustees desire to execute a

(1) 2 App. Cas. 300.
(2) June 24, 1868.
TEMPEST *v.* LORD CAMOYS.

Will—Powers of Management—Special Power of leasing Mansion-House —Discretion of Trustees.

A testator gave to his trustees a special power of leasing at their absolute discretion; which formed part of a special scheme of management of his mansion-house and estate for a limited period:—

Held, in a suit for the execution of the trusts of the will that the Court would compel the trustees to exercise the power of leasing.

SIR *C. R. TEMPEST*, by his will dated the 25th of March, 1863, devised his real estate to *T. E. Stonor* and *J. Fleming* for a term of 1000 years upon trust to pay certain annuities out of the rent and profits and subject thereto to accumulate a portion of the rents and profits for a limited period, and to apply the surplus upon the trusts therein declared under which Mr. *Fleming* took a beneficial interest.

The testator directed his mansion-house at *Broughton Hall* to be kept furnished and stocked as the same should be at the time of his death, and he empowered the trustees at their absolute discretion to lease the said mansion-house and the furniture therein for any time not exceeding twenty-one years.

By a codicil to his will he directed the fixtures, furniture, &c., at *Broughton Hall* to be treated as heirlooms and to go along with the hall; and he also gave directions for the maintenance of Divine worship in the chapel annexed thereto according to the forms of the Roman Catholic religion.

The trustees had also the ordinary power of leasing the real estate subject

trust the Court will always control their mode of exercising it, and it is only a little step further for the Court to direct them to

to the trusts of the will for twenty-one years.

An administration suit having been brought, a decree was made by which an inquiry was directed whether the mansion-house ought to be let under the trusts of the will. The Chief Clerk found that it ought to be so let, and a summons was taken out to vary the certificate by Mr. *Fleming*, who objected to the hall being let.

The Master of the Rolls (Lord *Langdale*) being of opinion that the power of the trustees was coupled with a duty, and that a trust was created which enabled the Court to interfere with the discretion of the trustees, confirmed the certificate and dismissed the summons.

Mr. *Fleming* appealed from this decision.

Baggallay, Q.C., and *Wickens*, for the Appellant.

Southgate, Q.C., and *Rigby*, for the Plaintiff.

Little, Q.C., and *Dryden*, for other persons interested.

CAIRNS, L.C.:—

In this case a decree has been made declaring that the trusts of the will of Sir *C. R. Tempest* so far as relates to the real estate ought to be carried into execution under the direction of the Court.

The will of the testator is a very long one, and the whole has been carefully commented upon in argument. The result of the whole will appears to me to be this, that the testator was extremely anxious that his mansion-house and all that belonged to it, and all the arrangements which had been maintained there in his lifetime, should continue after his death, and for that purpose he gives extensive powers of management to the trustees, and also gives to them not only a general power, of an ordinary kind, of leasing any part of his property, but a more special power of leasing for twenty-one years his mansion-house of *Broughton Hall*, and the furniture and effects about the mansion-house, as a furnished house. But it appeared to me, and I stated so at the close of the Appellant's argument, that it was impossible to contend that this power so given to the trustees with regard to the leasing of *Broughton Hall* was a power which vested in them the absolute discretion of saying according to their own pure *arbitrium* that there should be or should not be a lease made of *Broughton Hall*. It seems to me that the power is nothing more than part of a general scheme for the management of the estate; and the estate being brought under the management and superintendence of the Court on a scheme now before the Court, the Court will see that this part is, as much as any other part, attended to. In point of fact the argument of the Appellants would come to this, that the scheme of management in the will of the testator is to be handed over to the Court shorn of one of its most important features, and the Court is not to have the execution of the trusts which the decree says shall be executed, but is to have the execution of a certain number of those trusts, minus one trust of great importance, which the trustees are to reserve for themselves and execute for themselves if they so think fit. That is an argument which I think cannot be main-

C. A. 1882 TEMPEST v. LORD CAMOYS.

exercise their power, if one of them declines to do so: *Bethell* v. *Abraham* (1); *Webb* v. *Earl of Shaftesbury* (2). *Gisborne* v. *Gisborne* (3) is distinguishable.

Dryden, for other members of the family who supported the petition.

Romer, Q.C., and *Smart*, for Mr. *Fleming*, were not called on.

JESSEL, M.R.:—

It is very important that the law of the Court on this subject should be understood. It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. The Court says that the power, if exercised at all, is to be properly exercised. This may be illustrated by the case of persons having a power of appointing new trustees. Even after a decree in a suit for administering the trusts has been made they may still exercise the power, but the Court will see that they do not appoint improper persons.

But in all cases where there is a trust or duty coupled with the power the Court will then compel the trustees to carry it out in a proper manner and within a reasonable time. In the present case there was a power which amounts to a trust to invest the fund in question in the purchase of land. The trustees would not be allowed by the Court to disregard that trust, and if Mr. *Fleming* had refused to invest the money in land at all the Court would have found no difficulty in interfering. But that is a very different thing from saying that the Court ought to take from the trustees their uncontrolled discretion as to the particular time for the investment and the particular property

---

tained. I think, therefore, it was entirely proper in the Court to take fitting steps for the purpose of seeing if a lease could be made advantageously of the mansion-house on the terms pointed out by the will.

The appeal was accordingly dismissed.

(1) Law Rep. 17 Eq. 24.
(2) 7 Ves. 480.
(3) 2 App. Cas. 300.

which should be purchased. In this particular case it appears to me that the testator in his will has carefully distinguished between what is to be at the discretion of his trustees and what is obligatory on them.

There is another difficulty in this case. The estate proposed to be purchased will cost £60,000, and only £30,000 is available for the purchase, and the trustees will have to borrow the remaining £30,000. There is power to raise money by mortgage at the absolute discretion of the trustees, and assuming that such a transaction as this is within the power, and that the trustees can mortgage the estate before they have actually bought it, there is no trust to mortgage, it is purely discretionary. The Court cannot force Mr. *Fleming* to take the view that it is proper to mortgage the estate in this way; he may very well have a different opinion from the other trustee. Here again the Court cannot interfere with his discretion. The appeal must therefore be dismissed.

BRETT, L.J.:—

So far as my opinion goes, the question whether the accumulated fund should be laid out in land was not left to the discretion of the trustees at all; it was a trust, and if the trustees refused to invest it in land the Court would have enforced it; it might be by removing the trustee who refused to join or in some other way. I think that we have the authority of Lord *Cairns* in the previous case under this will, that the Court would have carried out the trust. But assuming that this would have been so, there was undoubtedly an absolute discretion in the trustees as to what land they should purchase. Mr. *Fleming* has not refused to exercise the power at all, but has objected to purchase this particular property.

It needs no authority to induce us to hold that if a discretion is given to trustees as to what property they should purchase the Court will not take it out of their hands. In the same way there was a discretion whether they should raise the money by mortgage, which the Court will not interfere with. Therefore, for both reasons, I take the decision of Mr. Justice *Chitty* as correct.

C. A. 1882 TEMPEST v. LORD CAMOYS.

COTTON, L.J. :—

I am of the same opinion. The two trustees in the case differ as to the purchase of an estate, and one of them makes an application in the suit to get the consent of the Court to its being done. The proposal is to invest a sum in Court in part payment of the purchase-money and to raise the remainder, amounting to about £30,000, by mortgage of the estate. As to the fund in Court, there is what amounts to a trust to invest it in land, and I am far from saying that where the trustees have a duty to perform the Court will not interfere and compel an unwilling trustee to do that which is necessary to be done; perhaps, as has been suggested, this Court would remove him, as it can do if a trustee commits a breach of trust. But in the present case, the trustee does not refuse to invest the money in land, but only objects to the particular investment proposed. But there is a further difficulty in this case; £30,000, part of the proposed purchase-money, is not the proceeds of land but is money which if raised at all must be raised by mortgage under the discretionary power of the trustees. As to that power, there is no trust at all, and the question is whether the Court in such a case will interfere with their discretion. I think it will not. No doubt it will prevent trustees from exercising their discretion in any way which is wrong or unreasonable. But that is very different from putting a control upon the exercise of the discretion which the testator has left to them.

In the present case the only question is whether a particular purchase is a suitable one; that is not a matter in which the Court ought to interfere.

The appeal will be dismissed; the costs will be costs in the cause.

Solicitors: *Ward, Mills, Witham & Lambert; Cole & Jackson.*

M. W.

In re DEAN.
DEAN *v.* WRIGHT.

C. A. 1882 *Aug.* 2.

[1881 D. 1470.]

Practice—Administration Suit—Revocation of Probate.

A decree was made at the suit of residuary legatees for the administration of the real and personal estate of a testator. After this a subsequent will was discovered by which the estate was disposed of in a different way. Probate of the old will was recalled, and letters of administration with the later will annexed were granted to one of the beneficiaries.

Under these circumstances the Court of Appeal made an order dismissing the action.

SAMUEL DEANE died in February, 1881, having made a will dated in 1869, by which he disposed of his real and personal estate in favour of his five children, and appointed his sister *Jane*, the wife of *Richard Wright*, and *T. Bowers* executors. The will was proved by *Jane Wright* alone, *Bowers* having died.

Shortly after the testator's death two of his children who had attained twenty-one brought an action against the executrix and her husband and the three infant children for administration and for execution of the trusts of the will, and on the 14th of January, 1882, a decree for administration was made.

After this a later will of the testator dated the 8th of May, 1875, was discovered, by which he disposed of his estate in a different way for the benefit of his five children, and named *Richard Wright* and *Jane Wright* trustees, but did not appoint executors. On the 22nd of May, 1882, the probate of the former will was called in and revoked, and on the 28th of July, 1882, letters of administration with the latter will annexed were granted to the testator's eldest child, one of the plaintiffs in the action, *Richard Wright* and *Jane Wright* having renounced. No creditor had yet come in to prove.

July 31. *Russell Roberts*, for the Plaintiffs:—

We ask for an order dismissing the action. No notice of appeal has been served, but the Defendants do not oppose. There is no

C. A. 1882 — *In re* DEAN. DEAN *v.* WRIGHT.

authority as to the proper course to be taken in such a case where the whole foundation for the decree in the action has been taken away; but it is submitted that the right course is to apply to the Court of Appeal.

[COTTON, L.J.:—Would it not be sufficient to stay all proceedings in the action?]

The title to real estate is involved, and the action would remain and would form a blot on the title. The Court can allow subsequent evidence to be admitted.

[COTTON, L.J.:—This is not admitting further evidence to shew that the decree was wrong, but evidence of facts which have taken place since the decree.]

The evidence, though subsequent, relates to facts which occurred before the action, namely, the revocation of the former will by the making of the later one.

E. S. Ford, for the Defendants.

THE COURT ordered the appeal to be in the paper on the 2nd of August. Mr. *Ford* accepting notice of appeal without requiring it to be served.

Aug. 2. THE COURT (*Jessel*, M.R., and *Brett* and *Cotton*, L.JJ.) made an order reversing the decree, and dismissing the action, the administratrix with the new will annexed undertaking to pay the costs, charges, and expenses of the Defendants out of the assets.

Solicitors for all parties: *Chester, Mayhew, Broome, & Griffiths.*

H. C. J.

C. A.
1882
CHITTY, J.
July 13.
C. A.
Aug. 2.

In re DUNLOP.
DUNLOP *v.* DUNLOP.

[1878 D. 251.]

Charge—Contribution—Locke King's Act (17 & 18 *Vict. c.* 113) [*Revised Ed. Statutes, vol. xii. p.* 387].

A testator held shares in a banking company by whose deed of settlement it was provided that if any shareholder did not on demand pay all moneys due from him to the company, the directors might declare his shares forfeited, and that nevertheless he should still be liable to pay the debt, and it was also provided that a shareholder must have paid all moneys due from him to the company before he could transfer his shares. The testator borrowed money from the company, and deposited the deeds of certain real estate with them as security, By his will he gave the above estate to his son *A.*, and his residuary property to his other sons. *A.* claimed that the testator's shares in the bank should contribute rateably to payment of the debt:—

Held, by *Chitty*, J., and by the Court of Appeal, that the provisions of the deed of settlement did not create a charge or lien on the shares for a debt due from the holder, and that no case for contribution arose.

Held, also that if the deed of settlement had charged the shares with all debts due from the shareholder to the company, a debt for which real estate had been specifically mortgaged would still have been payable out of the mortgaged estate before resorting to the shares which were only subject to a general lien.

J. M. DUNLOP, the testator in the cause, by will dated the 25th of June, 1878, directed his real estate in *Westmorland* to be held in trust for such one of his sons living at his decease as should first have attained or should thereafter first attain the age of twenty-five years, subject to the payment of a legacy of £2000 to each of his other sons who should attain twenty-five or die under that age leaving issue, and he gave his residuary estate upon trust for such of his sons, other than the son who should become entitled to the *Westmorland* estates, as should attain twenty-five or die under that age leaving issue.

The testator died on the 24th of August, 1878. *Robert Macmillan Dunlop* was his first son who attained twenty-five.

The testator was at his death entitled to considerable real estate in *Westmorland*, part of which had been purchased by him in 1872 for £26,710.

C. A. 1882

In re DUNLOP. DUNLOP *v.* DUNLOP.

The testator was a shareholder in the *Manchester and Liverpool District Banking Company*, which was formed in 1829, and was governed by a new deed of settlement executed in 1843. In 1874 and down to his death he held 574 shares. He was also a customer of the bank.

In January, 1874, the testator was indebted to the company in about the sum of £10,000, and applied to them for a further advance of £24,000. On the 19th February, 1874, he deposited with the company the deeds of the above property purchased in 1872 as security for the further advance, and the company in February and April, 1874, advanced him sums amounting to £26,381.

In October, 1876, the testator, who was then indebted to the bank in £26,546, applied for a further advance of £5000, which the bank agreed to make without requiring any further security, and advanced in fact £40,000. The manager at that time made a note in his diary that the bank had sufficient security.

On the 21st of December, 1878, a decree for administration of the testator's estate was made, containing an inquiry as to incumbrances on the testator's real and personal estate, but no certificate had yet been made.

The testator at his death was indebted to the bank in the sum of £31,363. They held no security but the above title deeds and the right of forfeiture of the testator's shares. The value of the shares was £21,164, and the real estate, the deeds of which were deposited, was estimated as worth £25,630.

Robert Macmillian Dunlop now presented a petition alleging that the debt due from the testator to the bank was secured not only by the deposit of title deeds, but also by a charge created by the deed of settlement of the bank upon shares in the bank belonging to the testator, and that the debt ought to be apportioned rateably upon the real estate and the shares, according to their values. The Petitioner accordingly asked to be let into possession of the estates comprised in the security, subject only to a part of the testator's debt to the bank bearing to the whole amount the same proportion as the value of the mortgaged real estate bore to the aggregate value of such real estate and the testator's shares in the bank.

The material clauses in the deed of settlement of the bank which bore upon the question were the following :—

171. "That upon the neglect or refusal of the proprietor or proprietors or other holder or holders of any share or shares in the capital of the company to pay any instalment, or upon the neglect or refusal of any proprietor or the husband of any female proprietor or of the executors, administrators, or legatees of any deceased proprietor, or of the assignees of any bankrupt or insolvent proprietor to pay on demand any other sum or sums of money which may be due and owing by such proprietor either alone or jointly with any other persons at law or in equity to the company, then and in any of the said cases it shall be lawful for the board of general directors to declare that the share or shares in the capital of the company of the person or persons who or whose executors, administrators, legatees, or assignees, or in the case of a female proprietor whose husband, shall so neglect or refuse as aforesaid, and the instalment or instalments paid thereon, and all dividends, bonuses, and other benefits and advantages attending the same, shall be forfeited to the company for the benefit of the other proprietors thereof."

There followed a clause enabling the board to discharge any shares from forfeiture, and restore them to the proprietors on such terms as they should think fit, but not after sale by the directors nor after six months from the declaration of forfeiture.

242. "That every proprietor of a share or shares in the capital of the company, and the husband of every female proprietor, and the executors, administrators, and legatees of every deceased proprietor, and the assignees of every bankrupt and insolvent proprietor, shall on demand by the board of general directors pay or cause to be paid at the principal place of business for the time being of the company all and every sum and sums of money due or owing from such proprietor at law or in equity, either alone or jointly with any other person or persons to the company, except nevertheless out of the operation of this clause all instalments on shares as to which a distinct provision is herein made. And the share or shares of every proprietor who or whose executors, administrators, legatees, or assignees, or in the case of a female proprietor whose husband, shall omit so to do, and every dividend

C. A. 1882 ~~ *In re* DUNLOP. DUNLOP *v.* DUNLOP.

or bonus declared upon such share or shares, shall be liable to be forfeited to the company for the benefit of the other proprietors thereof, and every proprietor whose share or shares shall so become forfeited shall be thereupon considered as expelled from the company and no longer a proprietor thereof, but the forfeiture of the share or shares of such proprietor and the expulsion of him or her from the company shall not be considered as discharging him or her or his or her executors or administrators, legatees or assignees, or the husband of any female proprietor, from the payment of the sum or sums of money due or owing from him or her to the company, or from any action or suit for obtaining the payment of the same respectively, or from any further liabilities or obligations in respect of his or her share or shares, but such proprietor and his or her executors, administrators, legatees, or assignees, and in the case of a female proprietor the husband of any such female proprietor, shall be and continue liable to the payment of such sum or sums of money, and to all further liabilities and obligations in respect of his or her share or shares, and to any actions and suits for the payment of the same respectively, to all intents and purposes as if there had been no such forfeiture or expulsion as aforesaid."

249. "That the husbands of female proprietors, and the executors, administrators, and legatees of deceased proprietors, before they can, under the provisions herein contained, be admitted proprietors or procure some other persons to become proprietors of the shares held by them in any of those capacities, or can sell the same to the board of general directors, and the assignees of bankrupt or insolvent proprietors before they can, under the provisions hereinafter contained, procure some other persons to become proprietors of the shares held by them in any of those capacities, or can sell the same to the board of general directors, shall pay or procure to be paid all and every sums and sum of money due or owing from such female, deceased, bankrupt, and insolvent proprietors, at law or in equity, either alone or jointly with any other person or persons to the company, including any instalments called for on such shares, notwithstanding the day fixed for the payment thereof may not have arrived."

252. "That the holder or holders of any shares in the capital

of the company may, upon the terms herein mentioned, procure some other person or persons to become a proprietor or proprietors in respect of all or any of the shares held by him, her, or them in the capital of the company, or sell the same to the board of general directors. Provided always, that in the case of any holder of shares who is a proprietor thereof, he shall have previously paid or procured to be paid all and every sums and sum of money due or owing from him at law or in equity, either alone or jointly with any other person or persons to the company, including any instalments called for on his shares, notwithstanding the day fixed for the payment thereof may not have arrived."

The petition was heard before Mr. Justice *Chitty* on the 13th of July, 1882.

Everitt, Q.C., and *E. Ford*, for the Petitioner, contended that the debt to the bankers should be borne rateably between the shares which the testator held in the bank, and the specifically devised real estate, and relied on *Leonino* v. *Leonino* (1) and *In re Athill* (2).

[They also referred to *In re Stockton Malleable Iron Company* (3), *In re Collie* (4), and *Locke King's Act* (17 & 18 Vict. c. 113).]

Romer, Q.C., and *Stirling*, for certain of the Respondents, contended that the bank had no active lien on the shares, but that under the terms of the deed all that they were entitled to do was not to allow the shares to be transferred till the debt was paid.

Popham, for parties in the same interest.

CHITTY, J.:—

This is a question of contribution raising a neat point, and the determination of the question before me does not, in my judgment, depend in any way upon the construction of *Locke King's Act*.

The state of things is this: at his death the testator owed about £26,000 to his bankers, who by express agreement between the

(1) 10 Ch. D. 460.
(2) 16 Ch. D. 211.
(3) 2 Ch. D. 101.
(4) 3 Ch. D. 481.

C. A. 1882 *In re* DUNLOP. DUNLOP *v.* DUNLOP. Chitty, J.

testator and themselves had an equitable charge on certain real estate. That real estate has been specifically devised. The testator himself also held shares in the bank, and there are certain clauses in the deed (which I need not state at length) which bear upon the question which is raised, that question being whether the shares are bound to contribute towards the payment of the debt in proportion to their value.

The clauses in the deed are to this effect, first, that if on demand being made and not complied with any debt which is due from the shareholder is not paid, the bank have a right to forfeit, and after having forfeited to sell, the shares which the debtor himself held in the bank. That provision I think I may throw aside altogether, because at the testator's death no demand had been made, and therefore at his death there was no right of forfeiture. Therefore no right has accrued to the bank in respect of the shares under these provisions. I say that because I take it that for all purposes of contribution the Court must look at the state of things, where all claim under the testator, which existed at the testator's death. The deed contains another set of clauses, the short effect of which is this, that when a shareholder is indebted to the bank on any account, the bank can refuse to allow him or his executors to transfer the shares, and the question is whether, in those circumstances, having regard to the right of the bank, the devisee is entitled to call upon the general personal estate in which the shares are included, to contribute towards the debt.

The proposition has been stated (and I think not incorrectly) that the right of contribution arises where there are two properties available in equity for the debt, of course in equal degree. It is quite clear that either by special agreement to be found in the instrument creating the mortgage itself, or by declaration on the part of the testator, he can, where two or more properties are comprised in the same security, direct the order in which the securities are to be applied *inter se* so as to make one the first and another the second, and so forth, available for the purposes of the charge.

Now at the testator's death were the shares available in equity for the payment of the debt? First of all, it is quite plain that the shares were not charged by the deed. The sort of right the

bank has is analogous to the common law lien, but it is not the same. It clearly has no active lien or, to use the term more commonly used in Courts of Equity, no charge on the shares. If it had a charge, of course the bank itself could have taken proceedings in equity to enforce it, and have the shares sold.

It is quite plain on the terms of this deed that no such right arose. The bank had no such right. Then all the bank can do is to say they will not allow the shares to be transferred unless the debt is paid. If the owner chooses to remain passive, that is to say, if the proprietor during his life does nothing, or if his executors after his death do nothing, and do not propose to transfer the shares, the bank equally can do nothing. They have no right whatever as against the shares. In fact they have no property in the shares. The whole property in the shares was in the testator. That seems to me to be sufficient to dispose of this case. I put by way of illustration, during the course of the argument, this case: Supposing that a ship is delivered to a shipwright to be repaired, and the shipowner gives an express security on some other property to the shipwright for the sum which will ultimately be payable in respect of the repairs, and, to avoid any question of the discharge of the Common Law lien, I go on to suppose that it is agreed expressly that the taking of the security for the amount ultimately payable in respect of the repairs is not to affect any lien the shipwright may have. In those circumstances if the shipowner died and left the property comprised in the express security to one person, and the ship to another, would the ship have to contribute? I think not; of course it is not necessary to decide that question, but it comes very near to the present case, and I only put it as an analogous one. I think that the person who took the ship would not have to contribute. But that case to my mind is not so plain as the one which I have before me, and which I have to decide. I hold that the mere right on the part of the bankers to say that the shares shall not be parted with does not create any charge on the shares, or give any right to the devisee of the real estate expressly charged to call upon the persons who are beneficially entitled to the shares under the will to contribute to the debt.

G. M

C. A. 1882

In re DUNLOP.

DUNLOP *v.* DUNLOP.

R. M. Dunlop appealed. The appeal was heard on the 2nd of August, 1882.

Macnaghten, Q.C., and *E. Ford*, for the Appellant:—

We say that the clauses of the deed give the bank a lien on the shares of the testator for moneys due from him to the bank, and that the shares and the real estate are therefore to be treated as mortgaged together for the same debt, and that there should be an apportionment. In a modern deed there would be a clause expressly giving a lien, but the provisions which have been adopted come to the same thing.

[COTTON, L.J.:—If one lien arises merely from the relative position of the parties, and the other from an express charge, can there be an apportionment?

JESSEL, M.R.:—A man deposits his title deeds with his banker to secure his balance, and sends them bills of exchange to be collected. They have a general lien on the bills. Would there be any apportionment between the bills and the real estate?]

We can hardly say that there would; but the present case is different. If a banking company allows a shareholder to overdraw it is to be presumed that they do so on the faith of his shares. There is a special contract making the shares a security, so the case is not like one of general lien.

[JESSEL, M.R.:—My impression is that *Locke King's Act* (17 & 18 Vict. c. 113) only applies where a property is specifically charged.]

Leonino v. *Leonino* (1) is very near the present case.

[JESSEL, M.R.:—In that case all the documents were specifically deposited by way of security. It was not a case of general lien. In *Averall* v. *Wade* (2) Lord *St. Leonards* says that to bring about apportionment you must be satisfied that the two properties were made a common fund.]

Here when the testator asked for a further advance the bank required no fresh security, and the manager made a note that the security they held was sufficient, which was not the case unless

(1) 10 Ch. D. 460. (2) Ll. & G. 252.

the shares were taken into account. The dealings went on the footing that the shares were a security to the bank.

Romer, Q.C., and *Stirling, contrà*, were not called upon.

JESSEL, M.R.:—

This is an appeal from a judgment of Mr. Justice *Chitty*, who has decided two points: 1. That the provisions of the company's deed of settlement do not create a charge on the testator's shares for the money due to the company from the testator; and 2, that if they did it was not a charge which would entitle the owner of freehold estate equitably mortgaged to the company for that money to obtain contribution from the owner of the shares. The deed is not in a common form, but contains remarkable provisions. By clause 171 it is provided that if a holder of shares does not pay on demand any moneys due from him to the company, the directors may declare his shares to be "forfeited to the company for the benefit of the other proprietors thereof." Then clause 242 provides that the forfeiture of shares shall not discharge the debtor from his debt, but that he shall continue liable to the payment of the same sum of money as if there had been no forfeiture. Then clause 249 provides that before any holder can transfer his shares he must pay all moneys due from him to the company.

Now as regards the forfeiture I cannot imagine any language more clear and precise. Whatever we may think of the justice and equity of such provisions it is plain that if the bank forfeits shares for the non-payment of a debt, the debt still remains due. I cannot see how this can be considered a security for payment. It is a penalty for non-payment. The shares are not applied in payment of the debt, which they must be if they were a security for it. The 249th clause does not carry the matter further. The shareholders are partners, and by the general law a partner cannot retire without the consent of all the other partners. That clause gives him power to transfer his shares on the condition that his debts to the company are paid. How can that be a security? I am therefore of opinion that there is no charge or lien at all on the shares for the debts of the testator to the company.

C. A. 1882 *In re* DUNLOP. DUNLOP *v.* DUNLOP. Jessel, M.R.

But suppose a charge or lien on the shares could be extracted from the terms of the deed, what would be its nature? It cannot be put higher than a general lien, such as the right of bankers to hold all securities of the customers which are in their hands as a security for money due to them from him. This is of a totally different nature from a special charge. The doctrine of Equity as to contribution, which only applies where two properties are equally charged, cannot therefore apply here. The special incumbrance creates a primary charge, and the property included in it is primarily liable in exoneration of other property which is only subject to a general lien. This doctrine has been expressed in different ways by different Judges. Lord *Eldon*, in *Marquis of Bute* v. *Cunynghame* (1), says that in order that a right to contribution may exist the two properties must be "equally liable." Lord *St. Leonards*, in *Averall* v. *Wade* (2), says that they must be "a common fund." I agree with the conclusion of Mr. Justice *Chitty*, and with his reasons, except perhaps his illustration as to the shipwright.

BRETT, L.J.:—

I am of the same opinion. It appears to me that the bank never had any lien or charge on these shares. As to forfeiture, if it be the true construction of the deed that the forfeiture does not extinguish or diminish the debt, it is clear that the power of forfeiture cannot be equivalent to a charge. I do not say that such is not its true construction, but I decline to say that it is. If a shareholder owed £10,000 to the company, and had shares in it worth £10,000 and the company forfeited them, I should struggle hard against the conclusion that the company could still sue him for the £10,000. Still I think that there was no charge, for the power of forfeiture only arises on non-payment after demand, and there never was a demand. Then come the clauses which give the company power to prevent a transfer of shares till moneys due to them from the shareholder are paid, but this power is useless unless the shareholder wishes to transfer his shares. He may owe the company £50,000, but the company as regards

(1) 2 Russ. 275, 299. (2) Ll. & G. 252.

this power is helpless. The company could not come to the Court for a sale, and if it could not it clearly has nothing which can be called a charge. I am of opinion then that there was no charge on these shares.

If this be the true view no question of contribution can arise.

COTTON, L.J.:—

The Appellant, who is devisee of an estate charged with a large sum by way of equitable mortgage for a debt due to the bank, asks for contribution as against the testator's shares in the bank. He relies on the equitable principle that when two properties which are subject to one common charge are given to two persons they must contribute. The first step is for him to make out that the shares are charged. I will not go into this question at length, for I do not think it necessary to decide it, but if it were necessary to decide it, I think that the clauses relied on, though they give the company means of putting pressure on a shareholder, do not create any such charge as to bring the case within the rule as to contribution. But if they did it is not enough for the Appellant to shew that there is a charge on both properties, he must shew that they are equally liable as between themselves. That is not made out here. The testator made a specific charge on the mortgaged property for the money which he borrowed. The charge, if any, on his shares was a general charge arising from a contract into which he entered when he became a shareholder. There was no intention shewn that the two charges should rank equally. The intention to be inferred is that the property specifically pledged should be primarily liable, and I can see nothing to lead to the conclusion that the testator intended the shares to form a common fund along with the mortgaged estate for satisfying this debt.

Solicitors: *Murray, Hutchins, & Stirling.*

H. C. J.

C. A.
1882
Aug. 3.

Ex parte AMOR. *In re* AMOR.

Liquidation Petition—Statement of Debtor's Affairs—Sufficiency—Debtor in Partnership—Solvent Partner—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126.

A debtor who carries on one business alone, and another in partnership, must when he files a liquidation petition (his partner being solvent) set forth in his statement of affairs the assets and liabilities of the partnership business in detail, as well as his own separate assets and liabilities; *i.e.* in each case he must give the names of the creditors, with the amount due to each and the names of the debtors, with the amount due from each. He must also state the account between himself and his partner, so as to shew the balance (if any) due to him.

If he does not give these particulars, his statement of affairs will be insufficient, and any liquidation or composition resolutions founded on it cannot be registered.

If for any reason it is impossible for the debtor to make such a statement of the affairs of the partnership, he cannot have a liquidation of his affairs by arrangement or a composition, but must submit to bankruptcy.

If without setting out the above particulars in his statement of affairs, the debtor refers (in such a way as to incorporate it with his statement) to a report made by an accountant which contains the necessary information, and which is produced to the meetings of creditors,

Semble, that this would be a sufficient statement.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

J. B. Amor carried on business alone at 43, *King Street, Covent Garden*, as proprietor of a club called the *Falstaff Club*, and also, in partnership with *S. T. Leigh*, at 37, *Bedford Street, Covent Garden*, and other places as an importer of cigars, under the firm of *Leigh & Amor*.

On the 2nd of June, 1882, *Amor* alone filed a liquidation petition. The first meeting of the creditors was held on the 29th of June. The statement of affairs produced by the debtor shewed that his liabilities were:

	£	*s.*	*d.*
"Unsecured creditors as per list A. .	30,294	10	6
" Do. members of the club . .	6,221	16	0
"Creditors for rent, rates, taxes, and wages as per list E.	334	1	2
"Total debts	£36.850	7	8"

He also stated that he owed to creditors fully secured, as per list B., £16,297, and that he estimated the value of the securities at £20,350, leaving a surplus of £4053. He also stated that he had other liabilities as per list D., amounting to £3543 5*s.* 6*d.*, "creditors for the joint stock estate."

On the other side he stated that his assets were:

	£	*s.*	*d.*
"Property as per list G.	1936	15	2
"Surplus from securities in the hands of creditors fully secured	4053	0	0
	5989	15	2
"Less creditors per list E.	334	1	2
"Total assets	£5655	14	0"

He estimated his stock in trade and his book debts as worth nothing.

List A. contained a list of his unsecured creditors, the name of each creditor and the amount of the debt due to him being stated; a similar list of the creditors who were members of the club, and (after the others) a list of the creditors of Messrs. *Leigh & Amor*, giving their names and the amount due to each, the total being £3543 5*s.* 6*d.* List B. contained the names of his secured creditors, with the amount due to each, the nature of the security held by each, and the estimated value of it.

List D. contained only the following statement:—

"My only liabilities, other than those enumerated in lists A. and B., are in respect of the creditors of the joint estate of Messrs. *Leigh & Amor*, who will not prove against my separate estate."

List G. contained the following statements:—

"All my property being mortgaged to my fully secured creditors, will appear in list B. of this statement of affairs.

"I am a partner in the firm of *Leigh & Amor*, and it appears upon balancing the accounts that there is a surplus, after paying the trade creditors, of £1936 15*s.* 2*d.*, which sum stands to the credit of my capital account in that business; but I am informed

C. A. 1882 *Ex parte* AMOR. *In re* AMOR.

that Mr. *Leigh* claims the entire amount, under a penal clause in the partnership agreement should the business be wound up through any act of mine."

The first meeting of the creditors was held on the 29th of June, 1882, when it was resolved "that this meeting be adjourned for fourteen days from this date, and that Mr. *Smart* (an accountant) be requested to investigate the debtor's affairs and report to an adjourned meeting, Mr. *Smart* to be assisted by a committee consisting of Mr. *Mark*, Mr. *Berry*, Mr. *Clark*, and the receiver, the expenses of such investigation to be paid out of the estate." At the adjourned meeting a report by Mr. *Smart* was presented. This report confirmed the debtor's statement that his share in the capital of *Leigh & Amor* amounted to £1936 15*s.* 2*d.*, setting out an account shewing how this sum was arrived at, but adding, "The whole of this amount, however, is claimed by Mr. *Leigh* under the terms of his arrangement with Mr. *Amor*. There is no partnership deed." The report was not signed or in any other way adopted by the debtor.

Resolutions were passed by the statutory majority of the creditors, accepting a composition of 1*s.* 6*d.* in the pound to be payable in two instalments of 6*d.* and 1*s.*, the first within twenty-eight days from the registration of the resolutions, and the second on the 1st of February, 1883, the second instalment to be secured to the satisfaction of the chairman and two other creditors who were named. The resolutions were confirmed at the second meeting of the creditors on the 25th of July. One of the dissentient creditors objected to the registration of the resolutions, on the ground (*inter alia*) that the debtor's statement of affairs was insufficient.

There was evidence that the debtor had on the 10th of May, 1882, made a settlement of some property on the occasion of his marriage with a lady who had previously been his housekeeper. The debtor, however, deposed that the property which he then settled was not worth more than £300.

On the 4th of July, 1882, the debtor was adjudicated a bankrupt, on a petition which had been presented by the dissentient creditor on the 2nd of June, but the advertisement of the adjudication was stayed pending the result of the proceedings under the liquidation petition.

The Registrar refused to register the composition resolutions. The debtor appealed.

Cooper Willis, Q.C., and *Herbert Reed*, for the Appellant :—

The statement of affairs is sufficient; *Leigh*, being solvent, would distribute the assets of the firm.

[JESSEL, M.R., referred to *Ex parte Solomon* (1).]

That case is distinguishable. A full investigation of the debtor's affairs was made by Mr. *Smart*, and it supplies any deficiency in the statement.

[JESSEL, M.R. :—That is not the debtor's statement of his affairs, he must pledge himself to the statement. Here he does not pledge himself to anything.]

The creditors of the partnership are not entitled to any dividend, there being a solvent partner, though they can vote; and the separate creditors are entitled only to the surplus of the joint estate. It is only possible to give an estimate of the surplus, and the debtor's own estimate is confirmed by the investigation made by the accountant whom the creditors appointed. The answers given by the debtor to questions put to him at the meetings of the creditors are to be taken as part of his statement of affairs: *Ex parte Aaronson* (2).

[JESSEL, M.R. :—Only if they are taken down in writing: *Ex parte Solomon.*]

Mr. *Smart's* report was read to the adjourned meeting as explaining the debtor's statement, and was adopted by him.

[JESSEL, M.R. :—In *Ex parte Aaronson* the object of the examination was to impeach the truth of the debtor's statement, to shew that a supposed asset did not belong to him at all, and the Court allowed his answers to be read.]

The debtor has pledged himself to the statement that he has roperty "as per list G." amounting to £1936 15*s.* 2*d.*

Winslow, Q.C., and *Sidney Woolf*, for the opposing creditor were not heard.

(1) 20 Ch. D. 281. (2) 7 Ch. D. 713.

C A. 1882

Ex parte AMOR. *In re* AMOR.

JESSEL, M.R.:—

The point which we have to consider is a very simple one. The debtor carried on a business alone, and also another business in partnership with a Mr. *Leigh*. The debtor having filed a liquidation petition, the Act requires him to make a statement of his affairs. This statement must be in writing, and it must pledge the debtor to the amount of his assets and liabilities. How has this debtor made out the statement of his own assets and liabilities? [His Lordship referred to the statement:—] The creditors have thus before them the materials for ascertaining what are his means of meeting his liabilities. If he is also a partner in a firm he ought to make a similar statement of the assets and liabilities of the firm, and then the creditors will be able to see what its position is. But that is not enough. He must also make a statement of the account between himself and his partner, and then the creditors will be able to see exactly what the amount of the surplus coming to him will be. That, in my view, is the proper mode of making the statement, and I can see no difficulty in making it as a general rule. Of course there may be exceptional cases in which this cannot be done—if, for instance, the partner should refuse to allow the debtor access to the books of the firm. If, however, for any reason he cannot make a proper statement of his affairs, he cannot have the benefit of the provisions of the Act as to liquidation or composition, but he must submit to be made a bankrupt. In the present case the debtor has a partner, and he has partly complied with the Act by giving a list of his joint creditors. But as to the assets of the partnership what he says is this: "It appears upon balancing the accounts that there is a surplus, after paying the trade creditors, of £1936, which sum stands to the credit of my capital account." That tells the creditors nothing. They are entitled to know whether the balance is correct, and how it was arrived at. His statement comes only to this, that in an account which has been drawn up by somebody this balance has been arrived at. That tells the creditors nothing. Then he says, "I am informed that Mr. *Leigh* claims the entire amount, under a penal clause in the partnership agreement, should the business be wound up through any act of mine." He is bound to set out fully what the claim of

Leigh is, and what the penal clause is, so that the creditors may judge for themselves. My impression is that this claim is all moonshine, the very thing which the bankrupt law was intended to prevent. You cannot tell from his statement what it is. His statement comes to this, I may be entitled to £1936, according as *Leigh* is or is not entitled to larger damages against me. It is impossible to tell whether the debtor is entitled to receive anything from the partnership. I think the statement is wholly insufficient, and, in my opinion, the appeal must be dismissed with costs.

BRETT, L.J.:—

I think that the rule which we are laying down will be a hardship on the solvent partner, because the state of his business will be disclosed; but still I think the rule must be so laid down. Mr. *Willis'* argument, as I understand it, comes to this, that whenever a person, who is desirous of liquidating his affairs by arrangement or composition with his creditors, has a business of his own, and also another business in which he has a partner, and the partnership business is solvent, he may, for the purpose of guiding his own creditors, put down in a lump sum the share which he says is coming to him from the assets of the partnership. It is admitted that if the business was his own this would not be sufficient. The fact that some one else is interested in it cannot make any difference. Why should he be excused from making a full statement with regard to the partnership business, which is his, though it is also somebody else's, because he has a partner in it? I can see no rule which absolves him from making a full statement because he has a solvent partner. If, then, the debtor ought to make a full statement of the affairs of the partnership business, has he done so here? He has not pledged himself to anything. He only says, "It appears upon balancing the accounts that there is a surplus of £1936." That is fatal. But suppose he had said "That is the balance due to me," and had produced the statement of an accountant who had prepared the accounts of the partnership, I am not prepared to say that, if that statement had contained all the necessary information, and the debtor under his own hand had referred to it in such a way as to incorporate it into his own statement of affairs, that would not

C. A. 1882

Ex parte AMOR. *In re* AMOR.

have been sufficient. But nothing of the kind has been done here, and I think it cannot be doubted that the statement is insufficient for the purpose of guiding the creditors.

COTTON, L.J.:—

By holding that this statement of affairs is insufficient, we may be putting some difficulty in the way of persons who desire to avail themselves of these clauses of the Act. But we have only to consider what is required by the Act in order to bind the dissentient creditors. Sect. 126 requires that the debtor "shall produce to the meetings a statement shewing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due." It does not say a statement of the aggregate of his assets or debts. One object is that the creditors may be able to form an opinion what dividend his estate will be able to pay. Another object is that there shall be a statement by the debtor himself. He ought, in my opinion, to give a full statement, and he should give it as his own statement in writing, and though an accountant's report, if it is properly adopted by the debtor, may be sufficient, still he ought to give all the information which he himself possesses, and it is not sufficient for him to say that by means of subsequent investigation it may perhaps be found out. It is not enough for him to supplement his own insufficient statement by something said by another person. He must himself make the statement, and he must pledge himself to its accuracy. Here the debtor has really pledged himself to nothing; he has given no information which can enable the creditors to judge whether they should accept the composition which he offers.

Willis, for the debtor:—

The Court will order a fresh first meeting of the creditors to be summoned as in *Ex parte Solomon* (1). The proceedings have failed by reason of a mere irregularity.

Winslow, for the opposing creditor:—

The advertisement of our adjudication was stayed only in order to see the result of the liquidation petition.

(1) 20 Ch. D. 281.

[JESSEL, M.R.:—I think we ought to have some information about the penal clause.]

The Registrar was of opinion that the resolution was not passed in the interest of the creditors. The statement of affairs as it stood shewed a dividend of 3*s.* 6*d.* in the pound. And there is the fact that the settlement on the debtor's wife was made shortly before the filing of the petition.

JESSEL, M.R.:—

The granting of a fresh meeting is purely discretionary. Under the circumstances I think we ought to refuse it.

BRETT, and COTTON, L.JJ., concurred.

Solicitors for debtor: *Beyfus & Beyfus.*
Solicitors for creditor: *H. A. Lovett & Son.*

W. L. C.

Ex parte REYNOLDS. *In re* REYNOLDS.

Witness—Examination as to Bankrupt's Dealings or Property—Jurisdiction to order Account—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96, 97.

Under sects. 96 and 97 of the *Bankruptcy Act*, 1869, the Court of Bankruptcy has no jurisdiction to order a witness to furnish an account in writing (not on oath) of money transactions between himself and the bankrupt, or property of the bankrupt received by him.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

L. R. Reynolds having been adjudicated a bankrupt, his brother, *G. K. M. Reynolds*, was summoned by the trustee in the bankruptcy, under sect. 96 of the *Bankruptcy Act*, 1869, for examination as to his dealings with the bankrupt. On the 1st of January, 1882, he was examined before the Registrar, and in the course of his examination it was suggested by the trustee's counsel that he should furnish an account of all moneys and shares received by him from the bankrupt, and of all his monetary transactions with him.

C. A. 1882

Ex parte REYNOLDS. *In re* REYNOLDS.

The witness expressed his willingness to do this, and the examination was adjourned to the 17th of May to enable him to do so.

At the adjourned sitting on the 17th of May the witness produced an account with which the trustee was not satisfied, and the Registrar made an order that the witness should within fourteen days from the date of the order furnish to the trustee a full account of moneys received by him from the bankrupt or from any other person or persons for him or on his behalf, with full details of each sum so received, the person from whom, and the date when received, and whether by cash, notes, or cheque, the date of any moneys being paid into the bank, and the name of the bank; also an account of all stocks, shares, or securities of any kind received by the witness from the bankrupt or any other person or persons, with full details of and as to the same. And it was ordered that the sitting should be adjourned to the 14th of June, 1882, and that the witness should peremptorily attend before the Registrar on that day and then produce his pass books, cheque books, paying-in slips, and any other books, papers, or memorandums, shewing the monetary transactions between him and the bankrupt, or with any other person or persons on his account.

In pursuance of this order the witness furnished a second account with which the trustee was not satisfied. On the 22nd of June the Registrar made an order that the witness should within seven days from the date of the order furnish to the trustee a further and better account, with dates and items, of all money transactions between the witness and the bankrupt, and of all moneys received in any way whatever and under what circumstances, whether as gift or otherwise, by him from the bankrupt between the 4th of December, 1880, and the 24th of August, 1881, and also that the witness should deliver to the trustee further and better particulars of all transactions with regard to stocks, shares, and certificates for shares, or receipts for payment on account of shares, bonds, debentures, bills of exchange, and other securities. And the sitting was adjourned to the 5th of July, 1882.

On the 5th of July the witness again attended and stated on oath that he could not render a better account than that which he had already furnished. The examination was again adjourned to

enable the trustee to consider what course he would adopt. The trustee afterwards served the witness with notice of a motion on the 11th of July for a further account. On that day the witness did not attend, and the Registrar made an order that he should on or before the 17th of July furnish to the trustee a further and better account, with dates and items, of all money transactions between the witness and the bankrupt, and of all moneys received in any way whatever and under what circumstances, whether as gift or otherwise, by him from the bankrupt or any one on his behalf, between the 4th of December, 1880, and the present time; and also that the witness should deliver to the trustee further and better particulars of all transactions with regard to stocks, shares, and certificates for shares or receipts for payments on account of shares, bonds, debentures, bills of exchange, and other securities.

From this order the witness appealed.

Finlay Knight and *A. A. Terrell*, for the Appellant:—

Under sects. 96, 97 (1), the Court has power to examine the Appellant, but there is no power to order him to furnish accounts in this way.

[They were stopped by the Court.]

Cooper Willis, Q.C., and *F. Cooper Willis*, for the trustee:—

The Appellant has submitted to furnish an account, and he has furnished an insufficient one.

[JESSEL, M.R.:—I agree it is insufficient, but I do not see how you can enforce his undertaking in this way. You can enforce

(1) Sect. 96 provides that "The Court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatsoever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings, or property, and the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings, or property."

Sect. 97: "The Court may examine upon oath, either by word of mouth or by written interrogatories, any person so brought before it in manner aforesaid concerning the bankrupt, his dealings, or property."

C. A. 1882

Ex parte REYNOLDS. *In re* REYNOLDS.

a formal undertaking in writing, but not one given on oath. Your remedy was to go on examining him.]

This is really an order to answer an interrogatory under sect. 97.

[JESSEL, M.R.:—It is not an answer on oath.

BRETT, L.J.:—How could you punish him for disobedience?]

We could move to commit him. If there is power to examine on oath, surely there is power to examine not on oath.

[JESSEL, M.R.:—The Act does not say so.]

The order may be construed as an order to answer on oath. The order of the 17th of May has not been appealed from, and it has not been obeyed. Nor has the order of the 22nd of June been appealed from.

[JESSEL, M.R.:—I cannot see any jurisdiction to make the order.]

If the Court orders a thing to be done, it must be taken to mean that it should be done in the proper way—on oath.

JESSEL, M.R.:—

We must discharge the order. But the Appellant promised to give the information. We discharge the order without costs. The trustee will take his costs out of the estate.

BRETT, L.J., and COTTON, L.J., concurred.

Solicitors for Appellant: *G. S. & H. Brandon.*
Solicitors for trustee: *Bellamy, Strong, & Baker.*

W. L. C.

HOOD *v.* NEWBY.

C. A.
1882
Aug. 4.

[1880 H. 1838.]

Bankruptcy—Protected Transaction—Notice of Act of Bankruptcy available for Adjudication—Debtor's Summons—Bankruptcy Act, 1869, *s.* 94, *sub-s.* 3.

After the Plaintiff had commenced an action against the Defendant for dissolution of partnership, the Plaintiff took out a debtor's summons against the Defendant. The Defendant failed to comply with it, and the Plaintiff filed a petition of bankruptcy against him based on the summons.

Another creditor afterwards took out a debtor's summons against the Defendant, and, on his non-compliance with it, filed a petition and obtained adjudication of bankruptcy against him. Before the adjudication and without notice of the act of bankruptcy on which it was based, the Plaintiff entered into an agreement with the Defendant for compromise of the action, which the trustee in the bankruptcy sought to impeach as void against the creditors:—

Held (reversing the decision of *Chitty*, J.), that although the non-compliance with the Plaintiff's debtor's summons was not an act of bankruptcy available for adjudication on the petition of the particular creditor who obtained the adjudication against the Defendant, it was an act of bankruptcy "available for adjudication" within the meaning of the *Bankruptcy Act*, 1869, s. 94, and therefore the agreement for compromise between the Plaintiff and Defendant was not a protected transaction under that section.

Ex parte Crosbie (1) distinguished, and the judgment of *James*, L.J., explained.

THIS was an application by the Plaintiff, *A. Hood*, to stay proceedings in the action under the following circumstances:

The Plaintiffs, *A. Hood* and *G. M. Innes*, carried on business with the Defendant, *E. H. Newby*, as dealers in rifles and ammunition. This action was brought for a dissolution of the partnership, and the Defendant was charged with wrongful pledging of the partnership property. On the 18th of June, 1881, a decree for dissolution and for consequential accounts and inquiries was made.

On the 4th of August, 1881, the Plaintiff *Hood*, and *W. Crook*, the receiver appointed in the action, filed a debtor summons against the Defendant *Newby* for a debt of £131. The Defendant having made default, *Hood* and *Crook* on the 29th of August, 1881, presented a petition for adjudication based upon the summons.

For some time negotiations for a compromise of the proceedings

(1) 7 Ch. D. 123.

C. A. 1882 HOOD v. NEWBY.

in the action had been going on between the Plaintiffs and the Defendant, and it was ultimately proposed that the Defendant should purchase the Plaintiffs' interest in the partnership for £21,000 subject to certain terms. The Defendant wrote a letter agreeing to this arrangement on the 22nd of December, 1881.

In consideration of this compromise the Plaintiffs' petition for adjudication of bankruptcy was postponed.

On the 20th of December, 1881, another petition for adjudication was presented against the Defendant by another creditor, *F. W. Pixley*, based upon a debtor's summons taken out by him, on which the Defendant was adjudicated bankrupt on the 19th of January, 1882, and *Pixley* was appointed trustee of his estate.

The Plaintiffs denied that they had notice of this petition at the time when the agreement for compromise was made.

On the 6th of July, 1882, the Plaintiffs obtained an order from Mr. Justice *Chitty* in Chambers to stay all proceedings in the action on the terms of the agreement for compromise, and on the 21st of July the trustee moved to discharge this order, but the motion was refused by the learned Judge, who thought himself bound by the authority of *Ex parte Crosbie* (1).

The trustee then appealed from this decision. Several objections were taken to the order, but one only requires a report.

Whitehorne, Q.C., and *Owen*, for the Appellant:—

The agreement for compromise was void as against the creditors, because the Plaintiffs had notice of an act of bankruptcy committed by the Defendant and available against him for adjudication of bankruptcy. The question turns upon the construction of sect. 94, sub-s. 3 of the *Bankruptcy Act*, 1869 (2). This clause has been on several occasions the subject of consideration by the Court, but there has been no decision upon this particular point. Our contention is that a contract cannot be protected under the section if the person contracting with the bankrupt has notice of any act of bankruptcy committed by the bankrupt which was

(1) 7 Ch. D. 123.

(2) 32 & 33 Vict. c. 71, s. 94, sub-s. 3: "Nothing in this Act shall render invalid (3) Any contract or dealing with any bankrupt made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication."

available for adjudication at the date of the adjudication, whether that act could have been taken advantage of only by the creditor who obtained the adjudication or by any other creditor. That is the literal meaning of the section, and if a different construction be put upon it its object will be in great measure frustrated: *Ex parte Hankin* (1).

[They were stopped by the Court.]

Ince, Q.C., and *Kirby*, for the Respondents, the Plaintiffs:—

The only act of bankruptcy of which the Plaintiffs had notice was the non-compliance with the debtor's summons taken out by *Hood* and *Crook* on the 4th of August. But this debtor's summons was not available for adjudication on the petition of any creditor except those who took it out: 32 & 33 Vict. c. 71, s. 6. Therefore it was not available for the particular adjudication under which the Defendant is now bankrupt. This precise point may not have been decided, but a very similar point was decided in *Ex parte Crosbie* (2); *Ex parte Gilbey* (3); *Ex parte Bouchard* (4); *Ex parte Quilter* (5). In those cases it was held that the act of bankruptcy must be available for adjudication at the date of the adjudication, otherwise the contract is protected, shewing clearly that in the opinion of the Court the act of bankruptcy must be available for the particular adjudication which had taken place. It is plain that this was the opinion of *James*, L.J., in *Ex parte Crosbie*. A debtor's summons stands on a different footing from any other act of bankruptcy. It is only a qualified act of bankruptcy; if the debt is paid or secured the summons falls to the ground, and it never becomes a complete act of bankruptcy unless a petition is granted on it. It is contrary to the intention of the *Bankruptcy Act* that it should be available for the benefit of any other creditor.

JESSEL, M.R.:—

The only point which it is necessary to decide in this case is this: A debtor's summons having been issued against a bankrupt,

(1) Law Rep. 10 Ch. 267.
(2) 7 Ch. D. 123.
(3) 8 Ch. D. 248.
(4) 12 Ch. D. 26.
(5) 30 W. R. 739.

C. A. 1882 HOOD v. NEWBY. Jessel, M.R.

and he having neglected to comply with it he has committed an act of bankruptcy. The creditor who has taken out that debtor's summons enters into a contract with him for a valuable consideration. Before the six months had expired another creditor who also issued a trader debtor's summons made him a bankrupt, and the question is, whether the contract or dealing by the first act of the bankrupt was such as to be protected by the 94th section of the *Bankruptcy Act* of 1869. That protects "any contract or dealing with any bankrupt, made in good faith and for valuable consideration before the date of the order of adjudication by a person not having at the time of making such contract or dealing notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication." At the time of the contract or dealing this creditor of course had notice of the act of bankruptcy created by the debtor's summons or consequent upon the issuing of the debtor's summons by himself. There is no question about that. Was it available against him for adjudication? Undoubtedly it was. The creditor might make him a bankrupt upon it.

Then what is the meaning of "available against him for adjudication." It does not say "available at the instance of any particular creditor," but "available." Then at what time available? "Available" may mean two things. It may mean available at the date of the contract or at the time of the adjudication. The cases of *Ex parte Bouchard* (1) and *Ex parte Gilbey* (2) decide that it means available at the date of the order of adjudication. That being so, it appears very plain that this transaction is not protected by the 3rd sub-section of the 94th section. The only remaining point is this. Is there authority binding upon this Court, as Mr. Justice *Chitty* thought there was binding upon him, to decide otherwise on account of the decision in *Ex parte Bouchard* and *Ex parte Gilbey*, following *Ex parte Crosbie* (3)? In my opinion there is not. You must always look to what was being discussed by the Judges as well as to the words used. The words used are undoubtedly sufficient to cover the doctrine contended for on the part of the Respondent, but when you see what

(1) 12 Ch. D. 26. (2) 8 Ch. D. 248.

(3) 7 Ch. D. 123.

was before them and what they had to consider it was this, whether the act of bankruptcy must be available at the date of the contract or at the date of the order of adjudication, and in deciding the latter they used the words "available for that particular adjudication," meaning available at that time, which was the only point they had to consider. They did not consider the other point, or intend to decide it, and indeed if you look at mere *dicta* there is a *dictum* in *Ex parte Hankin* (1) the other way. But I do not rely upon it for the same reason; that was not the point then before the Court of Appeal. It appears to me that these decisions do not cover this point at all, and that they were not intended to apply, and do not apply to it. The point is a new point, and must be decided according to the fair reading of the Act of Parliament, which, as I have said, is in favour of the Appellant. I think, therefore, this appeal must be allowed.

BRETT, L.J.:—

I am quite sure that if I had been in the place of Mr. Justice *Chitty* and had been alone in the Court I should have decided this case precisely as he decided it. I should not have felt myself entitled to act against the very trenchant words used by Lord Justice *James* in the Court of Appeal in *Ex parte Crosbie* (2), and followed twice after, as to the nature of the terms used and the phraseology used by the Court of Appeal. But on looking carefully into the case decided by Lord Justice *James*, and assisted as I am by the presence of two other Judges in a Court of Appeal, I cannot help saying that the present point was not before his mind, and that therefore the phraseology which he used, which is perfectly correct as to every other act of bankruptcy but this very peculiar one, is not to be taken as deciding the point in the present case. He was not considering an act of bankruptcy such as this, and we must therefore I think decide this case now, not according to the phraseology used by Lord Justice *James* with regard to other acts of bankruptcy, but with regard to the phraseology used in the statute itself having regard to this particular act of bankruptcy.

(1) Law Rep. 10 Ch. 267. (2) 7 Ch. D. 123.

C. A. 1882 HOOD v. NEWBY. Brett, L.J.

I cannot help still being of opinion that the argument used by Mr. *Ince*, and which must be used, does read the last part of the 2nd sub-section of sect. 94 as if it were written, "Any act of bankruptcy committed by the bankrupt and available against him for the adjudication." Now is that a true reading of it? When those who drew this very section wished to refer to the adjudication they say, "the order of adjudication," which is the same thing as "the adjudication." But in this latter part they alter their phraseology and instead of putting in the definite article, which is required in order to support the argument, they leave it out. That may seem a minute criticism, and if that criticism made the section absurd in its practical application to business, I should be for not taking notice of this omission; but when you see that the very act of omitting that particle makes the statute sensible as applied to all acts of bankruptcy—to this particular one as well as to all the others—it strikes me that it was designedly left out in order that the section might include this particular act of bankruptcy. The act of bankruptcy here is the non-compliance with the debtor's summons. It is true that that act of bankruptcy can only be relied upon for the support of a hostile petition when that hostile petition is the petition of the person who took out the summons. That is true, but where there are several debtor's summonses it is obvious that if there was not adjudication upon any of the others, each of the persons taking out a debtor's summons could, by petition, make the man a bankrupt. Therefore the disobedience of each of these debtor's summonses is an act which is available as an act of bankruptcy. It is available not for all persons, but each of them is available for a particular person. Therefore this latter part of the section, if you read it as it is written, is applicable to each of them, and it would be strange, as my Lord has observed, if a man having notice that a debtor's summons has been taken out within the limited time by a creditor, and that the bankrupt did not comply with that summons, could afterwards enter into a protected transaction with the bankrupt, although in the case of every other act mentioned in the statute he could not. I must say I think that the business necessity of the Act shews the actual meaning of the Legislature in leaving out that one very small word which Mr. *Ince* of necessity

requires us to put in, and under those circumstances I think we ought to decline to put it in.

COTTON, L.J.:—

The question which we have here to consider is this—whether this is a protected transaction; and for the purpose of considering whether it can be protected we have to decide whether the Respondent here entered into the dealing "without notice of an act of bankruptcy committed by the bankrupt and available against him for adjudication." Of course if one takes those words in their widest sense there is no limit at all, and notice of any act of bankruptcy which was available for adjudication at any time is sufficient to deprive the person dealing with the bankrupt of protection. That evidently would be unreasonable. It cannot be that notice of an act of bankruptcy committed ten years before would prevent him getting the protection. There must be some limit, and the natural limit is limit of time—not a limit as to a particular person on whose petition an adjudication could be obtained. And here, if we look into sub-sect. 3 to ascertain the time that is to be the limit, we are, in my opinion, at once directed to the date of the order of adjudication. That is to say, if he has no notice of an act of bankruptcy which at the time when the adjudication took place would have been available, then he is within the protection. If he has notice of an act of bankruptcy which was available for adjudication at the time—time being the only limit to which we can reasonably look—then he is not protected. That is the construction at which I should arrive on reading the Act of Parliament and giving the section a reasonable interpretation.

But it is said that we are precluded from giving that interpretation by the decision of this Court. Now, undoubtedly, in *Ex parte Crosbie* (1), and in two other similar cases, words were used by Lord Justice *James* and by the members of the Court which point to the particular adjudication. Lord Justice *James* says, "It must mean notice of an act of bankruptcy which would have been available for the making of the particular adjudication

(1) 7 Ch. D. 123, 125.

C. A. 1882 HOOD v. NEWBY. Cotton, L.J.

under which the proof is tendered." Now Judges as well as other persons sometimes use short expressions which, if expanded, would be perfectly clear, but which applied to a different set of circumstances in their non-expanded form are ambiguous. The Lord Justice was dealing there with this question—whether an act of bankruptcy committed twelve months before the actual adjudication would be an act of bankruptcy available for adjudication within the meaning of this section, and what he there, to my mind, clearly means, having regard to the point before him, is adjudication at the particular time when the adjudication was in fact made. It is adjudication at that particular date which was the only thing material, not the particular adjudication in the sense of an adjudication on the petition of the creditor who actually did get the adjudication. I think this is the reasonable interpretation of the language of Lord Justice *James*. Then, on the other hand, we have the language in another case of *Ex parte Hankin* (1). That is not a decision on the point before us; but undoubtedly it was said in that case, as Lord Justice *Mellish* had said before, that although non-compliance with a debtor's summons within the limited time is a complete act of bankruptcy, yet it is an act of bankruptcy which is subject to this peculiarity —that if the debt is paid, then it is wiped off and is no longer available for adjudication. But in this case the time elapsed without the debtor's summons being complied with, and it has not been wiped off by payment, and therefore it was an act of bankruptcy available for adjudication at the time when in fact the adjudication was made.

Solicitors: *Ashurst, Morris, & Co.; Harper & Battcock.*

(1) Law Rep. 10 Ch. 267.

M. W.

In re KERSHAW.

C. A.
1882
Aug. 5.

Lunatic—Parties entitled to attend Proceedings—Illegitimate Person—Attorney-General—Attorney-General of Duchy of Lancaster.

A lunatic, who was illegitimate and unmarried, was resident in *Lancashire*, and part of her property consisted of copyholds held of the Duchy of *Lancaster* :—

Held, that the Attorney-General of the Duchy of *Lancaster* was not entitled to attend the proceedings in the lunacy; the Queen's rights being sufficiently represented by the Queen's Attorney-General, who had leave to attend.

SARAH DRIVER KERSHAW was found lunatic by inquisition on the 3rd of February, 1881.

The lunatic was illegitimate and was unmarried, and resided at *Nelson-in-Marsden*, within the Duchy of *Lancaster*, and since July, 1879, had been confined in the *Lancaster* County Lunatic Asylum.

Her fortune consisted partly of copyhold and leasehold houses situate at *Brierfield-in-Marsden*, in the county of *Lancaster*.

A petition was now presented for the confirmation of the Master's report, by which he proposed the appointment of committees and an allowance for the maintenance of the lunatic, and proposed that Her Majesty's Attorney-General and the Attorney-General for the Duchy of *Lancaster* should have leave to attend the proceedings in the lunacy.

The petition was served upon the Solicitor for the Treasury and upon the Solicitor for the Duchy of *Lancaster*.

Byrne, for the Petitioner.

Stirling, for Her Majesty's Attorney-General, objected to the attendance of the Attorney-General of the Duchy of *Lancaster*. He referred to *Re Early* (1); *Ex parte Clarke* (2).

C. Parke, for the Attorney-General of the Duchy of *Lancaster*,

(1) 2 Coop. t. Cott. 108. (2) Jac. 589.

C. A. 1882 *In re* KERSHAW.

contended that the Queen in her right as Duchess of *Lancaster* would be entitled by escheat to the copyhold tenements held of the Duchy, and therefore the Attorney-General of the Duchy ought to be allowed to attend the proceedings.

JESSEL, M.R.:—

The practice of the Court has always been for the Queen's Attorney-General only to attend the proceedings in lunacy. I see no ground for the attendance of the Attorney-General for the Duchy of *Lancaster*. On the contrary, it will occasion additional expense, and will necessitate inquiries as to the lunatic's domicile and as to the manors of which she holds lands. Whether the Queen is entitled under the prerogative of the Crown or as Duchess of *Lancaster*, the Queen's Attorney-General sufficiently represents her rights. The petition will be confirmed, except that the Queen's Attorney-General will alone have leave to attend the proceedings. There will be no costs of this application to either Attorney-General.

BRETT, and COTTON, L.JJ., concurred.

Solicitors: *Ridsdale & Son; The Solicitor to the Treasury; The Solicitor to the Duchy of Lancaster.*

M. W.

In re WEAVER.

C. A.
1882
Aug. 5.

Lunatic — Maintenance, out of what Fund — Allowance to Relative for past Maintenance—Statute of Limitations—Supply of Necessaries to Lunatic.

Where a lunatic has property to which he is entitled for life under a settlement as well as property to which he is absolutely entitled, the Court will apply the life interest in the first place towards his maintenance; unless the trustees of the settled property have an absolute discretion whether to employ the whole or any part of the income for the lunatic's benefit.

Therefore where property was held upon trust to pay the income in such way, at such time, and in such manner as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was *held* that the trustees had no such discretion as would oust the jurisdiction of the Court to apply the whole of the income in the lunatic's maintenance in exoneration of her absolute property.

Gisborne v. *Gisborne* (1) distinguished.

The brother of a lunatic lady not so found by inquisition advanced money for the maintenance of his sister for several years under circumstances which left it doubtful whether he intended it for a gift or expected to be repaid. He died, and his sister was then found to be lunatic by inquisition. His executors having brought in a claim against the lunatic's estate for repayment of the advances, the Court made an allowance to the testator's estate for past maintenance, but limited it to advances made within six years before the testator's death.

Whether a person who supplies a lunatic with necessaries, knowing him to be lunatic, can maintain an action against him on the ground of an implied contract, *quære*.

ELIZA F. WEAVER was found lunatic by inquisition on the 13th of May, 1881.

The lunatic had been of unsound mind for many years previously, and was in July, 1865, placed in the County Lunatic Asylum for *Staffordshire*, where she had been supported by her brother, *Frederick Weaver*, out of his own money, at an expense of about £130 a year, until his death in August, 1880. He received the income of some small property belonging to the lunatic under the trusts of the wills of her father and mother, and kept an account of his receipts and payments on her behalf.

Frederick Weaver, by his will dated the 15th of July, 1880, and

(1) 2 App. Cas. 300.

C. A. 1882 *In re* WEAVER.

a codicil dated the 23rd of the same month, left his residuary estate to two trustees upon trust that they should convert and invest the same and should hold and apply the income thereof as follows, namely: As to one equal half part thereof in trust for his sister *Rosa Weaver* during her lifetime, and upon her decease in trust for *James Weaver;* and as to the other equal half part of the said income the said trustees were during the life of the said *Eliza F. Weaver* (the lunatic) to pay and apply the same in such way, at such times, and in such manner as the said trustees should at their authority and discretion think fit, for or towards the maintenance, personal comfort, support, travelling expenses, and medical or attendant's expenses of his said sister during her life, or for any of such purposes, and after her decease (so far as might be requisite) for her funeral expenses, and after her death and burial in trust for *James Weaver*. And the testator constituted the said *James Weaver* his residuary devisee and legatee absolutely and beneficially, and gave to his trustees power to invest any part of the said income and rents given for application towards his said sister *Eliza's* benefit not immediately wanted thereabout in any way thereinbefore authorized, and any surplus thereof not so required and not afterwards wanted to be resorted to thereabout, should go as an addition to the capital of the said moiety.

The capital of a moiety of the estate amounted to upwards of £10,000.

The executors of *F. Weaver* brought in an account of the receipts and expenditure of their testator on behalf of the lunatic from June, 1870, to August, 1880, which shewed a balance in his favour of £661, and they claimed payment of the debt out of the lunatic's estate as a debt due to the testator.

The Master in Lunacy by his report dated the 17th of July, 1882, found that the amount of property to the benefit of which the lunatic was entitled during her life, including that given by her brother's will, was upwards of £12,000, and that she had also absolute property of her own amounting to more than £2000. He submitted the question whether anything was due to *F. Weaver's* estate to the decision of the Court.

A petition was now presented by the committee for confirmation

of the report, and two questions were submitted to the Court. First, whether the allowance for maintenance should be paid primarily out of the life interest, or out of the absolute property of the lunatic; and, secondly, whether any and what sum should be paid to the executors of *F. Weaver* in respect of the past maintenance of the lunatic.

The evidence on the question whether *Frederick Weaver* intended to treat the expenses paid out of his own moneys beyond the income of the lunatic's estate as a gift to her, or whether he looked for repayment, was not conclusive. It appeared that in April, 1878, he had consulted his solicitor about taking proceedings for recouping himself out of her interest under the wills of her father and mother, but the proceedings were not taken, in consequence, at first, of the difficulty of making out the accounts, and ultimately in consequence of the illness of *F. Weaver*, or, as was alleged, of his reluctance to press his claim.

E. K. Karslake, Q.C., and *C. Walker*, for the Petitioner:—

The first question is out of what fund the future maintenance of the lunatic is to be paid. There is nothing in this case to take it out of the ordinary rule that the life interest of the lunatic should be first applied, as being the course most beneficial to the lunatic: *In re Ashley* (1); *In re Sanderson's Trust* (2).

Cozens-Hardy, Q.C., and *Underhill*, for the Respondents, the trustees and executors of *F. Weaver*:—

The distinction between this case and the ordinary case of a lunatic who has two funds applicable for payment of his allowance is that the settled fund is held by trustees who have an absolute discretion as to the application of the income for the lunatic's maintenance. It is more beneficial to the *cestuis que trust* under *F. Weaver's* will that they should apply the income in the lunatic's maintenance after the absolute property is exhausted, and the trustees are desirous of so doing, and in such a case the Court will not interfere with their discretion: *Gisborne* v. *Gisborne* (3) is precisely in point.

(1) 1 Russ. & My. 371. (2) 3 K. & J. 497.

(3) 2 App. Cas. 300.

C. A. 1882 *In re* WEAVER.

JESSEL, M.R. :—

In *Gisborne* v. *Gisborne* (1) there was power to apply the whole or such portion of the income as they might think fit. In the present case the trustees have only a discretion as to the time and manner of the application. There is an absolute trust to apply the income in the lunatic's maintenance: there is no discretion as to what portion they should apply. Of course, if the whole income is not required for her maintenance they are not to expend it, but are to accumulate the surplus. That being so, the rule is applicable, that the lunatic's property must be applied as appears to the Court to be most for her benefit. It is clear that it is best for her, that her maintenance should be provided out of her life interest, for if she should recover she will have the benefit of what belongs to her absolutely.

BRETT, L.J., concurred.

COTTON, L.J. :—

I am of the same opinion. The discretion of the trustees under the will is only as to the time and manner of the application of the income. The trust is to apply the whole income of the lunatic's share in her maintenance.

E. K. Karslake, Q.C., and *C. Walker*, for the Petitioner :—

The next point is the claim which the trustees and executors of *F. Weaver* make for repayment out of the lunatic's estate of the money expended by their testator in supporting his sister. The evidence shews that if ever he expected to be repaid what he advanced, he afterwards waived his claim. But if he meant the advances as a loan there was no legal contract, for there can be no contract either express or implied with a lunatic.

Cozens-Hardy, Q.C., and *Underhill*, for the Respondents :—

The evidence establishes that *F. Weaver* always expected to be repaid what he advanced for his sister's maintenance. He kept a regular account of his expenditure on her behalf, and instructed his solicitor to recover it from her estate. There is no authority for the proposition that a stranger cannot make a contract with a

(1) 2 App. Cas. 300.

lunatic for supply of necessaries, as he can in the case of an infant; and if a man advances money to maintain a lunatic, there is an implied contract for repayment: *In re Macfarlane* (1); *In re Gibson* (2). In the latter case Lord Justice *Mellish* says (3): "A lunatic cannot contract for his maintenance, so whoever maintains him becomes a creditor by implied contract."

[JESSEL, M.R.:—That is only an interlocutory observation. It is difficult to see how there can be an implied contract with a lunatic, if he is incompetent to make an express contract. It is not always safe to report interlocutory observations of Judges, they are very liable to be misunderstood.]

The same law is stated in *Pope* on Lunacy (4) where several authorities are cited. In *Howard* v. *Digby* (5) Lord *Brougham*, L.C., says that money advanced to supply necessaries for a lunatic is a valid debt in the eye of the Court incurred by the insane person.

If there is no legal debt, the Court is constantly in the habit of making an allowance for past maintenance, and we ask for such an allowance in the present case.

E. K. Karslake, in reply:—

If the Court makes an allowance to the executors for past maintenance, only six years' maintenance ought to be taken into account, by analogy to the *Statute of Limitations*.

JESSEL, M.R.:—

It is not necessary to decide the question whether there could be a legal debt in this case; for myself, I reserve my opinion on that point, which appears never yet to have been distinctly decided. But whether there was a legal debt or not the Court sitting in Lunacy has jurisdiction to pay the claim out of the lunatic's estate. If it was a legal debt it was one to which the *Statute of Limitations* would be applicable. If the testator had been alive he would have been unable to recover more than six years' maintenance. On the other hand if it was a legal debt it is not clear that he intended to insist on the lunatic's liability.

(1) 2 J. & H. 673.
(2) Law Rep. 7 Ch. 52.
(3) Law Rep. 7 Ch. 53.
(4) Page 239.
(5) 2 Cl. & F. 634, 663.

C. A. 1882 *In re* WEAVER.

Assuming it not to be a legal debt the Court is constantly in the habit of making an allowance for maintenance to those who have voluntarily maintained lunatics, and I think this is a proper case for making such an allowance. The only question is for how many years it ought to be allowed. Considering all the circumstances I think that the allowance should be restricted to advances for maintenance within six years before the testator's death.

BRETT, L.J.:—

A question has been flushed, if I may use the word, in this case which it is not necessary to decide, namely, whether if a person supplies necessaries to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied. I give no opinion upon that point. It has not been fully argued to-day, and it appears to me to involve a very difficult point of law, which I do not think has ever been settled by authority. For my own part I should doubt whether in favour of a person who knows of the lunacy you can imply a contract to pay for a supply of necessaries to a lunatic. But the present case must be decided with regard to the jurisdiction of the Court of Lunacy, and taking into account the relation of brother and sister which subsisted between the parties, and the other circumstances, I think that in the exercise of our discretion we shall be right in ordering that an equivalent should be paid to the testator's estate for all he expended in the lunatic's maintenance within the period of six years before his death.

COTTON, L.J.:—

It is not necessary to decide the question whether there was a legal debt in this case. If there was, it must have been limited as to time by the *Statute of Limitations*. But I am very doubtful whether the testator intended to insist on any legal claim at all. Under the circumstances I think it is reasonable that an allowance should be made for maintenance during six years.

Solicitors: *Hemsley & Hemsley*, agents for *Dent & Son, Wolverhampton; Brownlow & Howe*, agents for *Whitehouse & Co. Wolverhampton.*

M. W.

ROBINSON *v.* LOCAL BOARD FOR BARTON.

C. A.
1882
FRY, J.
Feb. 27;
March 30;
April 3.
C. A.
Aug. 4, 7.

[1881 R. 2513.]

Powers of Local Board—"New Street"—Bringing forward Buildings—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 2—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 34—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 156, 157—*Practice—Motion to vary Minutes—Production of Registrar's Note.*

Held, by the Court of Appeal (reversing the decision of *Fry*, J.), that the words "new streets" in sect. 34 of the *Local Government Act*, 1858, are not confined to streets which are constructed for the first time out of grass land or other vacant land, but apply also to an old country road in the neighbourhood of a town which, by the building of houses on each side of it, has recently become or is gradually becoming a street in the popular sense of the term, though it was previously a street within the interpretation clause of the *Public Health Act*, 1848:—

Held, therefore, that the local board had authority to make by-laws authorizing them to regulate the position of buildings in such a street with a view to keeping the street of a certain width.

On the hearing of a motion to vary the minutes of an order the solicitor of the moving party ought to produce a copy of the Registrar's note of what took place when the order was made.

THE writ in this action was indorsed with a claim for an injunction to restrain the Defendants from pulling down or interfering with certain buildings proposed to be erected or in course of erection upon certain land situate in *New Lane*, in the township of *Barton-upon-Irwell*, in the parish of *Eccles* in *Lancashire*.

After the issue of the writ a special case was stated by consent for the opinion of the Court under Order XXXIV. The case contained statements to the following effect:—(1) There is and has been for many years last past a public highway, called *New Lane*, at *Patricroft*, in the township of *Barton-upon-Irwell*, in the parish of *Eccles*, near to *Manchester*, within the district of the Defendant board. *New Lane* is 885 yards in length, and leads from a public highway, called the *Liverpool Road*, to another public highway, called the *Worsley Road*. (2) The parish of *Eccles* is of large extent, but only a small part of it is included within the district of the board. The village of *Eccles* is situate about four miles from *Manchester*, and was fifty years ago a small country village, but it

C. A. 1882

ROBINSON v LOCAL BOARD FOR BARTON.

has now become a kind of town suburban to *Manchester*. (4) *New Lane* has existed since a period long anterior to the existence of the board. It is not a turnpike road. It was formerly a country lane, with no well-defined footways, and was usually repaired by having cinders thrown upon it. The board have repaired it from the date of their formation. Until within the last ten years it was a cinder roadway, with no well-defined footways, and grass growing at the sides. It has a cindered footpath along the whole of both sides, except for a very short portion on the westerly side. The footpath along the easterly side was made by the board in the year 1880, and that along the westerly side in the year 1881. *New Lane* is repaired by the board as a highway repairable by the inhabitants at large. The board did at the expense of its district previously to, and in the year 1865, light, in the years 1876 and 1877 sewer, and in the March of the year 1880 channel and pave it along the whole length and width of the roadway. (6) All the buildings now situate and being on land abutting on *New Lane* or either side thereof, number eighty-seven houses. Of these sixty-two have been erected within the last ten years. (7) The buildings on the westerly side of the lane, and within thirty yards therefrom, consist of twenty houses. At the southerly end of the lane stands the *Waggon and Horses Inn;* 107 yards northwards is one house; 177 yards further north is one house; nineteen yards further north are four houses in semi-detached pairs; sixteen yards further north is one house; twenty-nine yards further north are six houses, four of them together and the remaining two together, with a space of ten yards intervening; then an intended road or street, the boundaries of which are set out and fenced for about fifty yards from *New Lane*, but the roadway of which is unformed; next it are two houses together, and at a further distance of thirty-six yards three houses standing together. Between these last three houses and the northerly end of the lane, a distance of 312 yards, are no houses, but there is an embankment carrying a line of railway, and at the end of the lane is one house. (8) Of the lands not now actually built upon situate upon the west side of the lane, a plot has been agreed to be demised to the Plaintiff for a long term for building upon; another plot has been agreed to be demised for a like term for

the same purpose, and other plots are now held by lessees under building leases. (9) The buildings now standing on the easterly side of the lane and fronting towards it consist of sixty-seven houses. [The case described their situations in detail, shewing that they included a row of sixteen cottages standing together, and twelve yards further north (the twelve yards being an opening left for an intended road) a row of twelve cottages standing together, and then considerably further north eight dwelling houses standing together, a row of nine cottages standing together, and after a break of eight yards a row of four cottages standing together.] (11) The Defendants are the urban authority within the meaning of the *Public Health Act*, 1875, for the local government district wherein the site of *New Lane* and all the land abutting on it are situate. The Defendants were, prior to the passing of the *Public Health Act*, 1875, the local board of health for the same local government district, and were so constituted by and under the provisions of the *Public Health Act*, 1848. By-laws were duly made by the Defendants under the provisions of the last-mentioned Act and of the *Local Government Act*, 1858, and such by-laws were confirmed by the local government board on the 1st of January, 1872, and were to be treated as embodied in the case. (13) The Plaintiff has, in pursuance of the said by-laws, given proper notice to the Defendants of his intention to erect new buildings on the land agreed to be demised to him, and has also caused to be left at the office of the board all the plans and sections required by the said by-laws. One of the plans shews the intended line of his proposed new buildings facing *New Lane* and the distance of such buildings from *New Lane*. The Defendants have disapproved and disapprove of the Plaintiff's proposed new buildings, upon the ground stated in the following memorandum of disapproval indorsed on the plans submitted to the Defendants by the Plaintiff:—

"9 Feb. 1880. Building Committee.

"Disapproved on the ground that the houses will contravene building line, and will be built within the line of the existing buildings on that side of street."

The Defendants require the said proposed building line to be

C. A. 1882 ROBINSON v. LOCAL BOARD FOR BARTON.

thrown further back about ten yards from the roadway of *New Lane* to a line shewn in black on a plan annexed to the special case marked "Building line defined by Local Board." (14) The Plaintiff has commenced to construct his new buildings in accordance with his plans, and with the building line thereby shewn, and the Defendants, relying upon their by-laws, have called upon the Plaintiff to shew cause why the works constructed by him should not be removed, and they threaten and intend to have such works removed. (15) The Plaintiff disputes the right or power of the Defendants to disapprove of his plans and sections upon the ground that his intended building line is too near the roadway of *New Lane*, as also the right or power of the Defendants to pull down his new buildings if erected in accordance with his plans.

The questions for the opinion of the Court are:

(1.) Whether *New Lane*, or the part thereof where the Plaintiff proposes to build, is a "new street" within the meaning of the term "new street" as used in the *Public Health Act*, 1875.

(2.) Whether the Defendants are entitled to disapprove of the Plaintiff's proposed new buildings on the ground that the intended building line is too near the roadway of *New Lane*.

(3.) Whether the Defendants are entitled to pull down the new buildings so in course of erection by the Plaintiff.

(4.) By whom the costs of this special case and action ought to be borne.

The special case referred to a plan from which it appeared that the Plaintiff's land was opposite to the two continuous rows of houses running along the eastern side of *New Lane*, and separated from each other by a road, and that these rows of houses extended both further to the north and further to the south than the Plaintiff's land, and had a frontage in the whole of more than double that of the Plaintiff's land.

The first of the by-laws as to new streets was as follows:—"Every new street shall be laid out and formed of such width and at such level as the board shall in each case determine." The 36th by-law required every person before beginning to lay out a new street to give notice to the board and deposit a plan. By the 37th by-law every person intending to erect any new building or to enlarge or alter any building erected since the date of the

constitution of the district, was required to give twenty-one days' notice to the board and leave at their office certain plans and sections, and also a block plan shewing the position of the buildings and appurtenants of the properties immediately adjoining the width and level of the street, the level of the lowest floor of the intended building and of the yard or ground belonging thereto. The 42nd by-law enabled the board to remove any works constructed contrary to the provisions of the by-laws.

The action came on before Mr. Justice Fry on the 27th of February, 1882.

Cookson, Q.C., and *Byrne*, for the Plaintiff:—

New Lane is not a "new street" within the meaning of sect. 157 of the *Public Health Act*, 1875, or the corresponding sect. 34 of the *Local Government Act*, 1858 (1), which strictly applies to this case, because the Defendants' by-laws were made before the Act of 1875.

Nor, assuming that there was power to make the by-laws, is this a "new street" within their meaning.

Again, this is not a street within the meaning of sect. 156 of the Act of 1875, and the Defendants have no power under that section to prevent the Plaintiff's proposed buildings (2). That

(1) Sect. 34 of the Act of 1858 provides that "Every local board may make by-laws with respect to the following matters (that is to say) (*inter alia*):—

"(1.) With respect to the level, width, and construction of new streets, and provisions for the sewerage thereof."

Sect. 157 of the Act of 1875 gives the same powers to "every urban authority."

And sect. 2 of the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), with which, by sect. 4 of the Act of 1858, the latter Act is to be construed, and of which it is to be deemed to form part, provides that "the word 'street' shall apply to and include any highway (not being a turnpike road), and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and the parts of any such highway, road, bridge, lane, footway, square, court, alley, or passage, within the limits of any district."

(2) Sect. 4 of the Act of 1875 provides that "'street' includes any highway (not being a turnpike road) and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not."

Sect. 156: "It shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the

C. A. 1882 — ROBINSON v. LOCAL BOARD FOR BARTON.

section applies only where there is a continuous line of buildings: *Reg.* v. *Fullford* (1). There the question arose upon the construction of sect. 28 of the Act 24 & 25 Vict. c. 61, the terms of which are almost identical with those of sect. 156 of the Act of 1875. At any rate, an injunction is not the proper remedy: *Kerr* v. *Corporation of Preston* (2).

Glasse, Q.C., and *Smyly*, for the Defendants:—

This is a "new street" within the meaning of sect. 34 of the Act of 1858, and therefore we had power to make by-laws regulating its width, and we rely on those by-laws as authorizing us to stop the Plaintiff's proposed buildings: *Dryden* v. *Overseers of Putney* (3); *Pound* v. *Plumstead Board of Works* (4); *Sawyer* v. *Vestry of Paddington* (5); *Baker* v. *Mayor of Portsmouth* (6). If an old highway is substantially changed by the building of new houses along its sides, it becomes a new street, just as if it was a street constructed for the first time out of a field. An Act which confers powers on a public body for the public benefit ought to be construed liberally: *Galloway* v. *Mayor of London* (7). If the board cannot prescribe a building line, they have no power of widening old roads.

Cookson, in reply:—

Sect. 154 of the Act of 1875 enables the board to purchase land for the purpose of widening a street.

FRY, J.:—

There exists within the jurisdiction of the Defendants, the *Barton* Local Board, an ancient highway (like many other old

---

house or building on either side thereof, nor to build any addition thereto beyond the front of the house or building on either side of the same.

"Any person offending against this enactment shall be liable to a penalty not exceeding 40s. for every day during which the offence is continued, after written notice in this behalf from the urban authority."

(1) Leigh & Cave, C. C. R. 403; 33 L. J. (M.C.) 122.
(2) 6 Ch. D. 463.
(3) 1 Ex. D. 223.
(4) Law Rep. 7 Q. B. 183.
(5) Ibid. 6 Q. B. 164.
(6) 3 Ex. D. 4, 157.
(7) Law Rep. 1 H. L. 34.

things it is called new) known as *New Lane*. Formerly it had a few scattered houses along its sides. Within the last ten years the ground on each side of it has been more or less covered with houses, sometimes continuous and in other places scattered, but the lane is gradually turning from a country high-road into a street. It is not a turnpike road. The Plaintiff is the owner of certain leasehold interests on the western side of the lane, and he has proposed to erect a row of nine houses upon a piece of the land which he has so taken. The Defendants decline to approve of a plan for building which he has deposited with them, on the ground that the proposed houses will contravene the building line by being built within the line of the existing buildings on that side of the street.

The question is whether this street was, at the time of the Defendants' refusal to approve of the Plaintiff's proposed buildings, a "new street" within the meaning of those words as used in the 34th section of the *Local Government Act* of 1858. [His Lordship read the section, and the definition of a "street" in the Act of 1848.] It would appear, therefore, that this lane, not having been a turnpike road, but having been a highway, was a "street" within the meaning of that definition, and the question is whether, by reason of the erection of these buildings, it had become a "new street."

In my judgment the terms of sect. 34 of the Act of 1858 apply to that which is really and truly a new street, viz., a street which is constructed anew for the first time. The provisions with regard to the by-laws contemplate the determination by the board, not only of the width of the street, but of its level, the mode of its construction, and the laying out of the sewerage. All these are things which may very properly and very reasonably be determined when land which has been grass land, or a piece of vacant land, is for the first time turned into a street.

But, supposing that I am wrong in this conclusion, it remains to inquire whether the Defendants' by-laws of 1872 do include the lane in question, because sect. 34 merely confers a power, and I am bound to inquire how far that power has been exercised by the Defendants in making their by-laws.

The by-laws which relate to new streets are these: The first

C. A. 1882 ROBINSON v. LOCAL BOARD FOR BARTON. Fry, J.

provides that "Every new street shall be laid out and formed of such width and at such level as the board shall in each case determine." It is obvious that that provision naturally applies to what I have called truly a new street, but it is very difficult to apply it to an existing roadway. Who is to lay out, or who is to form this old thoroughfare which has existed for a long time? Then the 2nd by-law provides that "Every such new street shall be formed of such level as to be as nearly as practicable even with every street and road to which it shall join, or with which it shall communicate, unless the said board shall otherwise order under the provisions hereinafter contained." There again it is obvious that that by-law contemplates a junction or communication of a new street with existing streets, for it makes use of words which are entirely inapplicable to an old road which has existed previously. The same observation applies to the 36th by-law, which says that "Every person shall, before beginning to make or lay out any new street, whether the same shall be intended to be used as a public way or not, give one month's notice to the board." That contemplates the intention of a person to lay out a new street, which is entirely inapplicable to an existing highway. Then it requires that the plan shall shew, amongst other things, "the level, width, direction, the proposed mode of construction, the proposed name of such intended new street, and its position relatively to the streets near thereto." That evidently applies to the formation for the first time of a really new street.

These provisions with regard to new streets appear to me, therefore, to have nothing whatever to do with that which, in the terms of the Act, was itself a street before the new buildings were erected along its sides. It is not, in popular parlance, a new street; it is not a "new street" within any definition of the Act; and, in my judgment, it is not a "new street" within the intention and scope of the by-laws.

But then it is said that certain cases have determined that streets may become "new streets" by reason of the continuity of the buildings along their sides. I have been referred to two or three cases which arose upon the *Metropolis Local Management Acts*. But it is to be observed that the definition given in sect. 112 of the Act 25 & 26 Vict. c. 102, of a "new street," applies not

only to a street "hereafter to be formed or laid out," but also to "all streets, the maintenance of the paving and roadway whereof had not previously to the passing of this Act been taken into charge or assessed by" what I will shortly call the local authorities. And there was a provision that the word "street" should apply to and include any highway, except the carriage-way of any turnpike road.

Now I will take one of the cases which arose under that Act —*Sawyer* v. *Vestry of Paddington* (1). The *Harrow Road* had been a turnpike road. It ceased to be a turnpike road; it fell under the jurisdiction of the local authorities, and it was therefore held to be, within the definition contained in that Act, a "new street." It had not previously been a street within the meaning of that definition, it was a turnpike road; but it became a "new street" when it fell under that jurisdiction. There is nothing, therefore, in these decisions inconsistent with the decision which I pronounce in the present case.

Another question which occurred to me during Mr. *Cookson's* opening, and which was discussed by him, turned upon the construction of the 156th section of the *Public Health Act*, 1875. But both the learned counsel for the Defendants have pointedly omitted to argue their case upon that section, and probably it would be sufficient for me to say that the Defendants do not rely upon it. As, however, I have myself formed an opinion on it I will express it, bearing in mind that my opinion has been formed after hearing the argument on one side only. [His Lordship read sect. 156.] It appears that, differing in distance, there are houses on both sides of the intended new buildings of the Plaintiff. It occurred to me that it might be possible for the Plaintiff to bring his buildings forward beyond the front wall of the house or building on either side, and that therefore it might be within the power of the local board to disapprove of his buildings. I repeat, the local board have not argued that they could do this, and, on consideration, I think sect. 156 would not apply, and for this reason, that, although, in my judgment, the words "bring forward any house or building" might apply as much to a new building as to an old one, yet the building so to be brought

(1) Law Rep. 6 Q. B. 164.

C. A. 1882 — ROBINSON v. LOCAL BOARD FOR BARTON. — Fry, J.

forward must be part of the street. The definition of a street includes "any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, passage, whether a thoroughfare or not." Now, it appears to me that a house cannot be said to form part of a footway, and, therefore, it can only be said to form part of a street in some other signification of the word "street," and I am not able to give any other signification to the word "street" as there used than as expressing a continuous line of houses. Therefore, I think that a "house or building forming part of any street" within the meaning of sect. 156 must be a house or building forming part of a continuous (I do not mean necessarily physically continuous in every part), but a continuous line of building. That appears to me to be the effect of the decision of the Court of Queen's Bench in *Reg.* v. *Fullford* (1) Mr. Justice *Blackburn* there observed: "It seems to me that a street exists, within the meaning of this Act, when the houses on one side are so contiguous as to be substantially one continuous row." In the course of the argument too Chief Baron *Pollock* said (2): "The word 'street' seems to have two meanings; the passage for the public, and also the houses on each side."

I could not have determined the second question asked by the special case without defining the construction of sect. 156, and therefore I felt bound to express my opinion on it, but it is an opinion adverse to the Defendants. I have not been asked to answer the first question, and I shall answer the 2nd and 3rd questions by holding that the Defendants are not entitled to disapprove of the Plaintiff's proposed new buildings on the ground that the intended building line is too near the roadway of *New Lane*, and that the Defendants are not entitled to pull down the new buildings so in course of erection by the Plaintiff.

One argument addressed to me by Mr. *Smyly* was to the effect that, unless the board could do this, they had no power of widening old roads. The answer to that is to be found in the 154th section, which shews that the board might acquire the land on either side of the lane, and so widen it, though not at the expense of the owners of the land. The Defendants must pay the Plaintiff's costs.

(1) Leigh & Cave, C. C. R. 417. (2) 33 L. J. (M.C.) 124.

10 Jur. N.S. 524

Mar. 30; April 3. The Plaintiff moved to vary the minutes of the order which had been settled by the Registrar.

Cookson, Q.C., and *Byrne*, for the motion.

Glasse, Q.C., and *Smyly*, *contrà*.

FRY, J., varied the minutes, and he added: When a motion to vary minutes is made, the solicitor of the moving party ought to apply to the Registrar who was present in Court on the day when the order was made, for a copy of the note which he entered in his book of what then took place, and the copy should be produced in Court on the hearing of the motion.

W. L. C.

The board appealed. The appeal came on for hearing on the 4th of August, 1882.

Rigby, Q.C., and *Buckley*, for the Appellants:—

We contend, in the first place, that this street is a new street within sect. 157 of the *Public Health Act* of 1875. It had been a highway for a great length of time, but it did not become a street till buildings were erected along it, and then it became a new street within the section: *Pound* v. *Plumstead Board of Works* (1); *Dryden* v. *Overseers of Putney* (2); *Baker* v. *Mayor of Portsmouth* (3).

The case then comes within the first by-law. We do not rely on the 36th, which appears only to relate to laying out a street where there has been no road before; but the 37th entitles us to see that no new buildings are erected in such a way as to contravene any determination of the board under by-law 1 as to the width of the street.

Cookson, Q.C., and *Byrne*, for the Plaintiff:—

This is not a new street within the meaning of the *Public Health Act*, 1875, s. 157, or the *Local Government Act*, 1858, s. 34. How can it be said that the Plaintiff is laying out a new street when he

(1) Law Rep. 7 Q. B. 183. (2) 1 Ex. D. 223.
(3) 3 Ex. D. 157.

C. A. 1882 — ROBINSON v. LOCAL BOARD FOR BARTON.

is doing nothing but erecting houses on one side of an old road? According to *Reg.* v. *Fullford* (1) there is a street only when there are continuous rows of houses. The present, then, is an appeal from a decision of the Court below on a question of fact whether these scattered batches of houses are sufficiently continuous to make the road a street, and the Court will be slow to entertain such an appeal. This has from time immemorial been a street within the interpretation clause of the Act of 1848, and it cannot now be considered a new street.

Rigby, in reply.

JESSEL, M.R.:—

I think this a very difficult case, and one as to which opinions may fairly differ without the person holding one opinion being entitled to say that the person who holds the other is wrong. But in construing this Act of Parliament I think we ought to look to what must be presumed to be the intention of the legislature. Now the general intent was evidently this, to give in every district to some local authority the power of regulating the mode of laying out and building new streets, a power to be exercised for the public benefit, and of course imposing a restriction on the ordinary rights of proprietorship. We have then to consider what the meaning of a "new street" is. I should say that laying out a new street means making a street where there was no street before, and the term "street" is *primâ facie* to be understood in its ordinary meaning. If we wanted authority, there is authority for saying that that is the proper mode of reading this Act of Parliament, though the definition clause makes the word in certain cases include more than what would popularly be called streets.

Now there are two ways in which a street may come into existence where there was no street before. A person may take a grass field or a country lane (for in my opinion, it makes no difference whether or not there was a public highway and lane, or a footpath existing before which is thrown into the street and is utilized, or whether there was nothing but a mere plot of grass land out of which a new roadway is made), he may take it and

(1) Leigh & Cave, C. C. R. 403; 33 L. J. (M.C.) 122.

build continuous lines of houses so as to form what is commonly known as a street. When I say continuous lines, I do not mean that there are to be no breaks or intervals, but there must be a certain degree of continuity. A new street may arise in another way, and that is, where it is not from the first laid out as a street in a formal manner, but may be considered to grow up, so to say, of itself. This often happens where there is an existing highway, and people build houses along the sides of that highway, so that, without any intention of laying out a street, the street grows. When does it become a street? This question cannot be answered until you know the locality. It must be a question in each particular case when the road becomes a street. At some time or other it becomes a street, and as soon as it does so it is a new street, and not the less a new street because some of the houses were built before it was a street.

That being so let us look at the terms of the Act of Parliament: "Every urban authority may make by-laws with respect to the following matters, that is to say, with respect to the level, width, and construction of new streets, and provisions for the sewerage thereof." That plainly enables them to make by-laws before the street is made at all. They may make general by-laws. They may say, "Every street in this district shall be sixty feet wide, every street in this district shall have a main sewer running through the middle of it, or two sewers, one on each side of it." They may make general by-laws, and the moment a street comes under the definition of "new street" it then becomes subject to the by-laws.

That being so, we have to consider whether that which is before us is a new street, and I think on the special case there can be no doubt whatever that it is a new street, and indeed a very new street. [His Lordship here read the 4th and 6th paragraphs of the special case.] When you come to look at the plan referred to in the special case, and look at the place opposite the Plaintiff's land, you find a continuous line of houses, in fact there are two continuous lines; they are separated by a roadway, and they both extend beyond the boundary of the Plaintiff's land; that there is a continuous line of houses more than double the width of the Plaintiff's land, and which extends beyond each side of it; the

C. A. 1882 ROBINSON v. LOCAL BOARD FOR BARTON. Jessel, M.R.

houses are thrown back from the lane, so that the lane is widened on the easterly side, which is a matter of considerable importance. I have no doubt that this is a new street.

Now what do the Defendants ask the Plaintiff to do? They have asked him to throw back his buildings to a building line so as to widen the lane on the westerly side. If it is a new street, and I think it is, they have a right to define the width, for the first by-law is this: "Every new street shall be laid out and formed of such width and at such level as the Board shall in each case determine." That must refer to width at the place, because a new street may be wider at one part than at another. If then the board determine that the street shall be bounded on one side by this building line which they have marked out, the boundary on the other side being already defined by houses already erected, their marking out the building line defines the width of the street. I think, therefore, that in substance they are calling upon the Plaintiff to build his street of a certain width. He is building his line of houses on the other side of the new street; he is laying out a new street by building a continuous line of houses; and I am satisfied that the Defendants, having called for a block plan shewing the position of the buildings and the width and level of the street which they are to approve, do by stating their building line on one side, the buildings being up on the other, shew the width of the street, and I think that the Plaintiff is not entitled to build so as to make it of less width than the width upon which they have determined.

BRETT, L.J.:—

No doubt the construction of this Act of Parliament and the by-laws under it and the application of either of them in particular cases is a matter of extreme difficulty, and it is difficult to express oneself in terms which will not invite criticism hereafter.

I think that the first remark to be made on the Act of Parliament is that it certainly deals with at least two different kinds of streets. One is a street which nobody in ordinary language without the help of an Act of Parliament would have called a street. And the other is a street which everybody without the aid of an Act of Parliament would have called a street. The interpretation

clause includes under the word "street" things which no one in ordinary parlance would call streets, as for instance, a highway which has not a house on either side of it. But where there is a certain number of houses on each side of a thoroughfare or a roadway, whichever you please to call it, everybody without the assistance of any Act of Parliament would call that thing a street, and call it nothing else. Therefore there are two totally different kinds of streets mentioned in the Act. Now can you by altering a street of one of these two kinds into a street of the other kind make a new street? In my opinion, you can, for you make it into something which is absolutely different from what it was before. That which no one would ever have called a street is made into that which everybody would call a street, and after that transformation is it new or is it old? I should say it is certainly new. But, further, I cannot help thinking that something which everybody would have called a street may be made into a new street within the meaning of the Act. Take the case of a street in *York*. There are a great many which are highly picturesque, but so narrow that you might knock your head on either side if you did not walk very straight. When the whole street is pulled down, and upon that very same line, and preserving the same name, a handsome street is erected with buildings of a very different class, and instead of being eight feet wide it is made sixty feet wide, would anybody doubt that in ordinary language that would be called a new street? Certainly not, and I cannot help thinking that a local board would have jurisdiction over it as a new street.

The first question of fact in this case must be, is this a street at all? It is a street without the help of the definition. It is that which would be called a street in ordinary language without any interpretation clause. The other question is whether the by-laws apply to it, which depends on the question whether it is a new street. It was suggested that it was not a new street because, by the interpretation clause, it has been a street ever since the original Act of Parliament was passed, and therefore is not new. But I say if you alter it from its original state into another wholly different kind of street, that new kind of street is a new street at some time or other. This street certainly has been altered into the new kind of street. Has that been done at such a time as to

C. A. 1882 ROBINSON v. LOCAL BOARD FOR BARTON. Brett, L.J.

make it a new street? I cannot help thinking that the term new street in the Act of Parliament must have a very elastic meaning, and that when you find that a street is in gradual course of completion, and is not yet finished, the time when the change was begun may be put very far off without its being called an old street.

But let us look at this a little further. It is often a difficult thing to say when a street begins to be a new street—that is when it begins to alter its character. New streets may be made under different circumstances. The whole land on both sides may belong to one owner. Then suppose he conceives a design of making a new street, and has a plan drawn. To my mind that does not begin the laying out the street within the meaning of the Act of Parliament. The Act of Parliament is not concerned with what people do upon paper, but with what they do in point of fact, and upon the land. When would such an owner begin to lay out and form a street? To my mind he would do so when he built his first house, having the intention to go on to make a street. He would then have begun to lay out and to form a street, and it would from that moment begin to be a street.

But streets may be formed in another way. Supposing that along the line of that which would eventually be considered a street there are a great many owners. No one of them could make a plan for the whole, but it may be clear that all of them are intending to build with regard to and so as to utilize an existing roadway. How then will those people lay out and form a street? Each of them by what he does on his own land would be taking part in laying out and forming a street. Which of them begins? I should say the one who first begins to build begins to form a street, and if you find that there are several proprietors along a line, each of whom acts so that the tribunal comes to the conclusion that all of them intend to build in the same direction—then the tribunal would have the right to say that there is a common intention amongst all these people to build in a particular course which will produce a street, and therefore the first of them, who, in virtue of that common idea, begins to build, is beginning to form and lay out a street, and he and all others are subject to the jurisdiction of the board.

There is another case to which my Lord has alluded, where there are several proprietors along a long line, but no tribunal could say that there ever was at the same time an intention amongst them all to build. One man at the end of the street may have begun to build, but the others have not built nor laid out their land as building land, nor advertised it as building land, nor done anything to shew an intention to build. Then the street really forms itself as it were by gradual accretion without any common intent. In such a case you have to wait until you can see by the course of building that there is a common intent to build. The moment you see that, you come to the conclusion that a street has begun to be formed.

Now, when did this street begin to be formed? It is obvious from the plan that the landowners are intent on building along this line. Many of them have already put buildings there, having regard to this roadway. This is, in my opinion, a street begun not so long ago as to prevent its being a new street, for it is not yet finished. Therefore I take it to be a new street.

Now, if the street is a new street it is subject to the by-laws of the board so far as they are applicable. It is contended that these by-laws do not affect the line of street. Now take the first by-law which provides that "Every new street shall be laid out and formed of such width as the board shall in each case determine." Supposing that that by-law had been "Every new street shall be formed of the width of sixty feet," then it would have been obviously applicable to this street, and nobody would have denied it. But that would have been a very foolish by-law, because it would not be desirable to have all the streets in the district of the same width. Therefore they do not specify the width but reserve a power of determining the width in each particular case. That by-law gives power to the board to deal with the width of this very street.

Now, how are they to deal with it? Is there anything in the by-law which enables them to deal with it once and once only, or may they deal with it from time to time? The by-law does not say that it shall be laid out on a plan, and, as I said before, the laying out on a plan is utterly immaterial. A plan laid out may shew an intent to do a thing, but the laying out in this by-law does not mean laying out on paper. It means laying out on the

C. A. 1882

ROBINSON v. LOCAL BOARD FOR BARTON.

Brett, L.J.

land. It is laying out and forming it. How are the board to determine the width? I cannot see that they are prevented in the case of each house to be built in the street from saying that they will determine as to that house how it shall form the width of the street, or in other words, how far that house shall be set backwards or set forwards.

It may be objected that, if that be so, they reserve to themselves the right of saying that one house shall be up to the line of the old road, and another shall be 20 feet back and another 10 feet. Well, it may be so, but unless you say that they are bound to make the street of the same width throughout its whole length, which can hardly be contended, you must take the other alternative, which is, in other words, that they have the power of acting capriciously. I suppose that everybody who lives in this great city or town, or whatever you please to call it, knows that the boards have the power of acting capriciously, and that many of them very often exercise it. But the Legislature intends to give them that power. If they put some houses forward and others back, without any method, they certainly would be acting with such caprice that there might be sufficient ground in holding that it was a dishonest caprice, and then I have no doubt that the law would be strong enough to control them. But, as long as they act honestly in the exercise of their power, it seems to me to be no valid objection to say that they are exercising their power by determining what the width of the street shall be at each point of it at the time when a person is about to form the width of that street by building a house at that point.

I think, therefore, that in this case the board had the power to make a by-law which would enable them to interfere with regard to this particular building as to its relation to the street, and that they did make a by-law which gave them the power to deal with it. And in that view it seems to me that it makes no difference whether that which the Plaintiff intended to build was a line of buildings or only one building. It seems to me that the board were acting within their power, and have not improperly exercised it.

COTTON, L.J.:—

I must confess that this Act of Parliament, as well as the

by-laws, have raised in my mind very considerable doubt; but I have arrived at an opinion in accordance with that entertained by the rest of the Court.

The question to be considered really is this. First, whether under the Acts of Parliament the local board had power to make by-laws enabling them to interfere as to the construction of these houses in the way in which they purport to control the operations of the building owner; and, in the second place, whether in fact they had made any such by-laws.

The first point to be considered is, whether the road in question is a new street within the *Public Health Act*, 1875, sect. 157, sub-s. 1. In my opinion it can be called a new street independently of any interpretation clause in the Act. A short time ago, undoubtedly it could not in ordinary parlance be called a street; but now, if we look at the facts stated and at the plan, I think that one cannot come to any other conclusion than that this has now in ordinary parlance become a street, and it is equally clear that a few years ago, possibly even within the last four or five years, it was in no way a street, but a lane or country road. It is a street, and therefore, in my opinion, in ordinary parlance it is a new street.

But the difficulty which was raised is this, that there is an interpretation clause under which this, although it was only a country lane or road, was within the meaning of the Act of Parliament a street unless the context prevented it. But although there is that interpretation clause, in my opinion it does not prevent us from saying that a street is a new street when in ordinary parlance, and not under the interpretation clauses of the Act of Parliament, it is now a street, whereas within a short period of time it was not in ordinary parlance a street at all.

Then comes a question of greater doubt, whether having regard to the remainder of sub-sect. 1, it can be said that this is a new street within the provision of the Act of Parliament, so that any by-laws "with respect to the level, width and construction of new streets" could be made to apply to it. A great difficulty arises from this, that the Act of Parliament does not explain how the matters which come within this section are to be dealt with. This section applies to intended new streets. Now where there is no street or road at all, but the owner or owners intend to construct a

C. A. 1882 ROBINSON v. LOCAL BOARD FOR BARTON. Cotton, L.J.

street over vacant land, no one would doubt that the urban authority had under the Act power to make by-laws as to how it was to be laid out. But the clause must also apply, in my opinion, to that which originally was not, in ordinary parlance, a street but has become such so as to be a new street in the sense to which I have referred. Then how is such a street to be dealt with? How can by-laws be made with reference to the level, width and construction of these highways which, although not streets before, in ordinary parlance, had become such. In my opinion in such a case the by-laws do not direct what is to be done in alteration of that which already exists, but give directions controlling the way in which matters which are to be done shall be done. If a house is to be built, then the by-laws can prevent that house from being built contrary to the by-laws; if an alteration is to be made in the level or width of the street, then the by-laws will prevent the alteration being made otherwise than as allowed by the by-laws, and if a street is to be laid out as a new street over vacant ground, then of course the by-laws will apply, and will prevent the making of it, except in the way authorized by the by-laws. The difficulty which I at first entertained vanishes when one considers that the by-laws are preventive and framed to prevent persons from doing anything contrary to the rules and regulations laid down by the board under the authority of the Act of Parliament. Therefore, in my opinion, under this section it is within the power of the local board to lay down by-laws which should affect this street.

Then comes the question whether they have done so. The case of *Reg.* v. *Fullford* (1) certainly decides that a new street includes not only the carriage-way and footway but also the houses, and that, therefore, by-laws can be laid down under the authority of this section with reference not only to the way but also to the houses. If that is so, then the board may lay down directions not only as to the roadway but also as to the houses; and they may direct how with reference to the required width of the street the houses are to be constructed. Have they done so in the present case? I think they have, because when they require that a ground plan shall be made and laid before them, shewing where the house is to be placed, reserving to themselves

(1) Leigh & Cave, C. C. R. 403.

the right as to approving or not approving of the intended position of the house, as well as the other structures, they do in fact say that in new streets to which the by-law is to apply, any house which is built is to be put down in a position which they sanction and approve. I doubted for some time whether this was the proper way to make a by-law, and whether they ought not to say that on such and such a part of the street, it shall be of a certain width; but I think on the whole that they are at liberty (and of course the Legislature would give a public body the credit that they would exercise their powers in a reasonable way) in each case to say "shew me where you wish to put your house, and we will decide whether that is a proper position, having regard to the required width of the street at that place." That view is somewhat supported by sect. 155, which empowers the board in the case of old streets not to lay down a general line, but when any house is to be rebuilt to say where that house is to be rebuilt, and how far, if at all, it is to be thrown back from its old position, the power being given in terms as to any one single house. I think it is not unreasonable, therefore, that in the by-laws to be made under sect. 157 as to new streets, they should make the building line by requiring in each case the position of any new house to be laid before them for their approval so that they may require the street to be made of sufficient width.

The Court decided that question 1 must be answered by declaring that the part of *New Lane* where the Plaintiff proposed to build was a new street within the meaning of the term as used in sect. 157 of the *Public Health Act*, 1875; that questions 2 and 3 must be answered in the affirmative; and that as to No. 4, the Plaintiff must pay the costs both below and in the Court of Appeal.

Solicitors for Plaintiff: *Byrne & Lucas*, agents for *Taylor, Kirkman, & Colley, Manchester.*

Solicitors for Defendants: *Le Riche & Son*, agents for *Cobbett, Wheeler, & Cobbett, Manchester.*

H. C. J.

C. A.
1882
Aug. 7.

In re QUARTZ HILL &c. COMPANY.
Ex parte YOUNG.

Practice—Cross-Examination—Withdrawal of Affidavit—15 & 16 *Vict. c.* 86, *s.* 40.

Where a person has made and filed an affidavit for the purpose of being used in a matter pending before the Court, he cannot be exempted from cross-examination by the withdrawal of the affidavit.

Clarke v. *Law* (1) approved and held to be applicable where the person making the affidavit is not a party to the proceedings.

THIS was an appeal by the company from an order of Mr. Justice *Kay*, directing *William Roebuck* to attend to be cross-examined on his affidavit.

On the 8th of December, 1881, a special examiner was appointed for the purpose of taking the examination, cross-examination, and re-examination of witnesses who had made affidavits on an application by Mr. *Young*, a shareholder in the company, to have the register rectified by removing his name.

Mr. *Roebuck* had made an affidavit on behalf of the company which was filed on the 21st of November, 1881. An appointment for the 10th of July, 1882, was taken for his cross-examination, but as he was not present it was adjourned. The special examiner certified as follows as to what afterwards took place before him.

"An appointment for the 17th of July, 1882, was subsequently taken by the applicant's solicitor, and on that day *William Roebuck* attended before me, and was duly sworn. After the witness had been sworn, but before his examination had commenced, counsel for the company objected that the company had withdrawn the witness's affidavit, and that he was attending before me only in obedience to a subpœna served upon him by the applicant, and that, therefore, the witness could only be examined in chief by the applicant's counsel, and could not be cross-examined. I expressed an opinion that under the circumstances his affidavit could not be withdrawn, and that he might be cross-examined by the applicant's counsel, but I referred the matter to

(1) 2 K. & J. 28.

the Court and allowed the examination to proceed *de bene esse*. The examination of the witness by the applicant's counsel proceeded for a considerable time, the questions put being such as in my opinion might be put either by a counsel examining in chief, or by a counsel cross-examining. At a certain stage of the examination the counsel for the company took the objection that the three or four questions then last put to the witness by the applicant's counsel had distinctly taken the form of a cross-examination (as in my opinion they had), and on that ground he declined to allow the witness to be further examined before me. The witness, acting on the suggestion of the company's counsel, declined to answer further questions. I repeated the opinion which I had expressed (as above-mentioned) before the commencement of the examination, but I referred the matter to the Court, and adjourned the sitting generally."

Mr. *Young* then applied to Mr. Justice *Kay* that Mr. *Roebuck* might be ordered to attend for cross-examination, and on the 3rd of August, 1882, Mr. Justice *Kay* ordered accordingly, and directed the company to pay the costs of the application.

The company appealed.

Seward Brice, for the company:—

It was decided in *Massam* v. *Thorley's Cattle Food Company* (1), that where an affidavit is not read, the opposing party cannot cross-examine the witness. That decides the present case. *Re Sykes' Trusts* (2) also supports our contention.

[JESSEL, M.R.:—That case only decided that the hearing of the petition could not be stopped in order to cross-examine the deponent if the affidavit was withdrawn.]

In *Clarke* v. *Law* (3) it was only decided that a party to the cause could not withdraw his own affidavit, but must submit to cross-examination, it does not apply to an affidavit made by a stranger. In *Pike* v. *Dickinson* (4), where a party had made an affidavit, Lord *Selborne* followed *Clarke* v. *Law*, but pointedly expressed his disapproval of it. The doctrine, therefore, is not to

(1) W. N. (1879) 181.
(2) 2 J. & H. 415.
(3) 2 K. & J. 28.
(4) 21 W. R. 862.

C. A. 1882

In re QUARTZ HILL, &c., COMPANY. *Ex parte* YOUNG.

be extended. In *National Insurance and Investment Association* v. *Carstairs* (1) an affidavit was allowed to be withdrawn.

[BRETT, L.J. :—This is the result of the rule you wish us to establish. A party gets a person to make an affidavit, well knowing that he cannot stand a single adverse question. If cross-examination is threatened, he withdraws the affidavit; if no cross-examination is threatened, he uses it.]

There is no hardship in that, the opposite party can call him as a witness. It is settled that in bankruptcy if an affidavit is withdrawn the deponent cannot be cross-examined: *Ex parte Child* (2).

[COTTON, L.J. :—The Act 15 & 16 Vict. c. 86, s. 40, is imperative that any party who has made an affidavit to be used or which shall be used in the proceedings shall be bound to attend to be cross-examined.]

That applies only to a party.

[JESSEL, M.R. :—"Party" is evidently there used in the sense of "person."]

Dunham, contrà, was not called upon.

JESSEL, M.R. :—

Considering the number of years which have elapsed since *Clarke* v. *Law* (3) was decided, and considering the good sense of the decision, I should have thought its authority unquestionable had it not been for the observations attributed to Lord *Selborne* in *Pike* v. *Dickinson* (4), which probably are incorrectly reported, and which I do not understand. The principle of *Clarke* v. *Law* is quite intelligible—a party who has given notice to read an affidavit is not entitled to withdraw it in order to avoid cross-examination. He need not use the evidence if he does not like it. So a party who has called a witness is not to withdraw him in order to avoid his being cross-examined. This is good sense, and, in my opinion, we are not now at liberty to decline to follow that decision.

The wording of the *Chancery Amendment Act* of 1852 (15 & 16

(1) 9 Jur. (N.S.) 955.
(2) 20 Ch. D. 126.
(3) 2 K. & J. 28.
(4) 21 W. R. 862.

Vict. c. 86), is open to criticism. The word "party" appears to be sometimes used there in its proper sense, and sometimes in that of "person." Unless we read "any party having made an affidavit" as meaning "any person," &c., in the latter part of sect. 40, the Act furnishes no means of compelling a person who has made an affidavit but is not a party to the proceedings to submit to cross-examination, yet we know that from the time of the passing of the Act it was the practice to cross-examine him. Shortly after the passing of the Act the General Orders of the 7th of August, 1852, were issued under it, and the 37th of those Orders provides that "where it is decided to cross-examine any party, whether a party to the cause or matter or not," who has made an affidavit to be used, or which shall be used on any claim, motion, petition, or other proceeding before the Court not being the hearing of a cause, a certain notice shall be given. This assumes that there is power under the Act to cross-examine a person who has made an affidavit whether he is a party or not. And the Consolidated Order XIX., rule 9, is to the same effect. Whatever might have been said originally as to the meaning of the statute this reading was put upon it thirty years ago by the Court and has been acted upon ever since, and it is too late to reconsider the question now.

BRETT, L.J.:—

As regards the section of the statute 15 & 16 Vict. c. 86, I have nothing to add. As regards the principle laid down by Lord *Hatherley* in *Clarke* v. *Law* (1), I consider it a principle applicable not merely to a proceeding in Chancery or at Common Law, but to proceedings before every tribunal. Every rule of procedure ought to be framed with a view to its being such that if it be properly acted upon the course of justice will be kept pure and undefiled. With this view I think it most important that no person who has taken a step with a view to gaining an advantage should be at liberty to withdraw it if he finds that it will not answer. Lord *Hatherley* accordingly held that where a party had proposed himself as a witness and filed an affidavit, he could not, when threatened with cross-examination, withdraw the

(1) 2 K. & J. 28.

C. A. 1882

In re QUARTZ HILL, &c., COMPANY. *Ex parte* YOUNG.

affidavit and escape cross-examination. I cannot imagine anything more calculated to bring the course of justice into contempt than to allow a person to file evidence which if there is no cross-examination makes in his favour, but which he knows will break down on cross-examination, and then to withdraw it if he finds that cross-examination is threatened.

COTTON, L.J.:—

I am not satisfied that the Act, independently of any authority, does not by its plain terms prevent the witness being withdrawn, for it makes a person liable to attend to be cross-examined who has made and filed an affidavit to be used or which shall be used. Be this as it may, the rule was laid down in *Clarke* v. *Law* (1) in 1855, that a person who has made an affidavit cannot be withdrawn from cross-examination. It is a good rule, and one which ought to be followed.

The question has been raised whether the decision applies to a person not a party to the cause or matter, but Lord *Hatherley* appears to lay down the rule generally, and it has been acted upon in practice. Whatever, therefore, the true construction of the Act may be, I think it is now too late to take a different view from that which has been so long acted on.

Solicitors for Company: *Snell, Son, & Greenip.*

Solicitor for *Young*: *H. Sydney.*

(1) 2 K. & J. 28. 2 Jur. N.S. 229

H. C. J.

In re SWIRE.
MELLOR *v.* SWIRE.

[1882 S. 925.]

C. A.
1882
V.-C. B.
March 24.
C. A.
April 19.

Practice—Conduct of Proceedings—Concurrent Suits—Action in Palatine Court.

The general rule that where two actions have been commenced for the administration of the same estate the conduct of the proceedings will be given to the plaintiff in the first action, although the decree in the second has been obtained first, applies to actions commenced in the Palatine Court of *Lancaster*, as well as to those commenced in the High Court of Justice.

In considering whether the rule ought to be applied the Court will have regard to the special circumstances, and will take into account the amount of the interest of the plaintiff in the first action, and his object in bringing his action.

The fact of a plaintiff, being a stranger to the family, who had bought up the reversionary interests of some of the residuary legatees, *held* not a sufficient reason for not giving him the conduct of the proceedings, although his purchase of some of the shares was disputed on the ground of inadequacy of consideration and undue influence.

The decision of *Bacon*, V.C., reversed.

ON the 29th of November, 1881, *Edwin Storer* commenced an action in the Chancery Court of the County Palatine of *Lancaster* against *S. Swire* and others, the trustees of the will of *Samuel Swire*, deceased, to have the share of the residuary real and personal estate to which the testator's daughter, *Mary Southam*, and her issue were entitled under the will ascertained; and, if necessary, to have the testator's real and personal estate administered by the Court; and the Plaintiff also charged the Defendants with wilful default and breaches of trust in the administration of the estate. The statement of claim was delivered on the 21st of December, 1881.

The Plaintiff *Storer*, who was a solicitor, claimed as assignee under assignments from three of *Mary Southam's* children of their respective interests under the will, each share amounting to one-fifty-fourth part. Two of these assignments were afterwards disputed, on the ground that they had been obtained by undue influence and for inadequate consideration.

C. A. 1882 — *In re* SWIRE. MELLOR *v.* SWIRE.

On the 25th of February, 1882, the action of *Mellor* v. *Swire* was commenced in the Chancery Division of the High Court of Justice by *Frances Jane Mellor*, another of the testator's children, being a residuary legatee under the will, against the trustees, asking for the administration of the estate of the testator. This action was heard as a short cause on the 11th of March before Vice-Chancellor *Bacon*, and the ordinary decree for administration made.

On the 24th of March the Plaintiff in *Storer* v. *Swire* moved before Vice-Chancellor *Bacon* that he might be at liberty to attend the proceedings in the action of *Mellor* v. *Swire*, and have the future conduct of the action.

Cozens-Hardy, Q.C., and *Hamilton Humphreys*, for the motion:—

The Plaintiff in the Chancery action admits that she had knowledge of the former action in the Palatine Court. She says she is bringing the Chancery action with the approval of the Defendants, who are also our Defendants, and yet she says her action is not collusive. Then a decree is taken without opposition or discussion, or, in common phrase, is snapped. Our action charges wilful default, and we submit we are entitled to the same relief in this Court as if, after a common administration decree, we had obtained leave to file a supplemental bill, charging wilful default.

[BACON, V.C.:—Why do you not transfer your action?]

We are desirous of transferring our action, but we apprehend there is no jurisdiction under the Act of 1854 (17 & 18 Vict. c. 82) to enable this to be done. Sect. 8 of that Act is confined to cases where any person who may be a necessary or proper party to the Palatine action "shall not be subject to the jurisdiction." Here one of the Defendants lives out of the Palatine jurisdiction in *Carmarthenshire*, but he has submitted to the order. Unless we have the conduct of the action in this Court we shall find all the accounts taken in this collusive action by persons who have no interest in having them taken strictly: *Rhodes* v. *Barret* (1); *Taylor* v. *Taylor* (M. R., May 6, 1881, unreported); *Zambaco* v. *Cassavetti* (2).

(1) Law Rep. 12 Eq. 479. (2) Law Rep. 11 Eq. 439.

Marten, Q.C., and *G. B. Finch*, for the Plaintiff in *Mellor* v. *Swire*:—

We do not object to the applicant having leave to attend proceedings in our action and being permitted to proceed with his own action in the Palatine Court, as he may be advised. But the two actions are distinct, and there has been no snapping a decree. The circumstances in *Rhodes* v. *Barret* (1) were altogether different. There is, in fact, no hard and fast rule—the question is always one for the discretion of the Court. The reason for the commencement of this action was that Mrs. *Mellor* found, as the other tenants for life also found, that her income was being stopped. The Palatine action is clearly a speculative action, instituted by a Plaintiff having a very small interest, with a view to manufacturing costs, and who admits that one of his objects is to get as high a price for his shares as possible.

Millar, Q.C., and *E. S. Ford*, for the Defendants, the trustees.

Cozens-Hardy, in reply.

BACON, V.C.:—

The point is one of very considerable importance.

I do not in the least withdraw from what I have said in the course of the case, that it is the duty of the Court to repress sharp practice; and the fact that a decree has been made in the case secondly instituted is no reason, and never has been considered a reason, why the suit first instituted should not be allowed to proceed in some shape or other. Now I cannot take away from the Plaintiff in the second suit the conduct of the action unless I am satisfied that she ought not to be trusted with it. It is alleged in a very faint way that the second suit is collusive. On the other hand, it is positively denied on oath that there is any collusion or anything like collusion. The reason the tenant for life has for instituting this suit is a perfectly good reason, and why should I deprive her of her right? What has she done to forfeit her right? What authority have I to inflict a punishment upon her by taking away from her the conduct of the action

(1) Law Rep. 12 Eq. 479.

C. A. 1882 *In re* SWIRE. MELLOR *v.* SWIRE. V.-C.

and giving it to the Plaintiff in the first action? Her suit is a perfectly right one. There has been no snapping of a decree. On the contrary, I am reminded now of what was done on the 11th of March, and I find that the proceedings in the County Palatine Court are upon the record in the Chancery action. But nothing was said on that occasion to attract the attention of the Court or to cause the Court to take particular notice of what was being done. It is said the suit in the County Palatine Court is by a person who has a very remote interest. It is not for that reason that he is not entitled to prosecute his suit. The more remote his interest, perhaps the more urgent is his right to have the estate properly administered. Because he cannot come into possession of the beneficial interest which he claims for some years probably, it is right that he should know that in the meantime the estate is not squandered or improperly dealt with. The decree which has been read to me provides for everything that the Plaintiff in the Palatine Court can desire, namely, the receipts by the trustees and executors, the receipts from the various descriptions of property, although not in terms expressly asked for, and an inquiry into the application of those receipts which must follow of itself from the stating of the receipts. The order in the case which was handed up to me of *Taylor* v. *Taylor*, which was made by the Master of the Rolls, I have not the least doubt was properly made. There have been in my experience, and probably in the experience of every one else, many cases in which it was right for the Court to interfere and to take from the Plaintiff in the second suit the conduct of the decree which he had obtained. But without some reason the Court never made such an order. The Court does not make it in a vague way. If it were shewn to me that the Plaintiff in the second suit has sought for and obtained some advantage which would be prejudicial to the Plaintiff in the first suit, I would give the Plaintiff in the first suit the conduct of the second action. There is no such case to be found in the evidence before me. There is nothing to induce me to believe that the second suit was not properly instituted, nor anything to induce me to think that it will not be properly conducted. The terms of the decree satisfy me that every inquiry which ought to be made in the administration of this testator's

estate will be made in that suit. I will give the present applicant liberty to attend the inquiry under that decree, but I will give him no more, and I leave him to deal with his Palatine suit as he thinks fit.

J. B. D.

From this decision *Storer* appealed. The appeal was heard on the 19th of April, 1882.

Cozens-Hardy, Q.C., and *Hamilton Humphreys*, for the Appellant, referred to *Frost* v. *Ward* (1); *Rhodes* v. *Barret* (2). They were stopped by the Court.

Davey, Q.C., *Marten*, Q.C., and *G. B. Finch*, for the Plaintiff *Mellor*:—

We do not deny the general rule that the plaintiff who brings his action first ought to have the conduct of both actions; but that rule only applies to actions in the High Court of Justice, and not to cases where one of the suits is in the Palatine Court. Moreover, the rule is always subject to exceptions in special cases —the Judge must always exercise his judicial discretion. In this case the action in the Palatine Court was not brought for the benefit of all the parties interested in the action. The Plaintiff has bought up the interests of three of the children as a speculation, and he ought not to have the conduct of the proceedings. There is no pretence for saying that our action was collusive. Everything that the Appellant really wants can be obtained in our action, if an inquiry as to wilful default is introduced into the decree, and the Appellant can have leave to attend the proceedings. All the tenants for life wish our action to proceed. The action in the County Palatine is therefore quite unnecessary: *Dowbiggin* v. *Trotter* (3).

Millar, Q.C., and *E. S. Ford*, for the trustees:—

We have no objection to having an inquiry for wilful default introduced into the decree in *Storer* v. *Swire*. Whoever has the

(1) 2 D. J. & S. 70.
(2) Law Rep. 12 Eq. 479.
(3) 20 W. R. 794.

C. A. 1882

In re SWIRE. MELLOR *v.* SWIRE.

conduct of the proceedings, the action in the County Palatine ought to be stopped: *In re Alison's Trusts* (1).

JESSEL, M.R.:—

It will be the best course to stay proceedings in the action in the County Palatine Court. We will therefore make an order that at the request of *Storer*, and the trustees not objecting, two inquiries be added to the decree in the action, one as to wilful default and the other as to certain dealings with the estate by the trustees, of which he complains. And then *Storer* must undertake to stay all proceedings in the action in the County Palatine Court, and the Defendants must consent to its being done.

On the other point the general rule applies equally whether one action is in the Palatine Court and the other action in this Court, or whether both actions are in this Court, or both in the Palatine Court. The general rule is that the plaintiff in the first action shall have the conduct of the proceedings, although the decree or order or judgment is first obtained in the second action. That is the general rule—a rule made for the best of reasons, to discourage racing, as it is called, and to prevent double or treble costs being incurred by solicitors or parties. Of course there may be special circumstances which will entitle the Court to say that the rule is to be departed from in any particular instance. I have looked through the judgment of the Vice-Chancellor in this case, and he seems not to have founded his decision on any such special circumstances, because if he had done so I should have been very reluctant to have interfered with any decision founded on such special grounds. I do not say that in a sufficiently strong case the Court of Appeal would not interfere, but it must be a very strong case when a decision is founded on a special ground. But it is not so here. The Vice-Chancellor did not rely on any special ground, but he apparently went on some other general rule than the established rule.

Then I have to consider whether or not there are special grounds in this case which ought to induce the Court of Appeal to depart

(1) 8 Ch. D. 1.

from the rule, although the Vice-Chancellor did not rely on any special ground. Now I cannot find sufficient grounds in this case. In the first place, the Plaintiff is the assignee of three reversionary interests amounting altogether to one-eighteenth. At the time when he brought his action not one of those transactions was disputed, but subsequently we are told two out of the three are disputed, so that he is only the undisputed assignee of one fifty-fourth share. Now I do not say that is not an element to be considered. When we find a man with a very trifling interest indeed, involving an estate of great magnitude in a Chancery suit, it may be possible to arrive at the conclusion that his object was not the *bonâ fide* administration of the estate but merely to make costs, and in that case I think the amount of his interest and the nature of his position may be fairly taken into consideration. But here there was no dispute at the time he instituted this action as to the two other fifty-fourth shares. He came in as assignee of one-eighteenth, and he came in, therefore, having a real substantial interest in the estate, and, as was stated on the part of the Respondents, his object was to sell that interest to an advantage, it being in fact a substantial interest. Therefore it is not the case of a man having a very trifling interest instituting a suit only for the purpose of making costs. Again, I cannot see any ground why the trustee or assignee of a legatee has not, as a general rule, the same right to institute a suit as the original legatee: at the same time it is a circumstance not to be forgotten that a stranger to a family may have an interest as regards making costs which members of the family have not, but in this case, as I said before, I am satisfied of the Plaintiff's *bona fides*.

In the next place, something was said about the Plaintiff being a solicitor; that makes no difference when the Court is satisfied that the suit is not instituted for the purpose of making costs. It may or may not have some bearing on that question, but that is not really so here.

In the next place, I think the Court is bound to look at the nature of the questions raised. If they are raised vexatiously or obviously for the purpose of creating unnecessary or expensive litigation, of course that is a circumstance, but I am sorry to say,

C. A. 1882 *In re* SWIRE. MELLOR *v.* SWIRE. Jessel, M.R.

having looked at both statements of claim, I am clear there are some questions of considerable difficulty, some serious questions to be discussed as to the meaning of this will. I give no opinion upon it at all, I am not in a position to give an opinion on it, because I have not considered it sufficiently, but I have looked at it for that purpose, and I come at all events to the conclusion that there is serious matter for discussion, and that these questions are not here raised for vexation, but are raised *bonâ fide*.

Then there is only one other argument which I feel bound to attend to, which is this, that although the questions are raised *bonâ fide*, and they are serious and real questions, yet they are raised, we are told, for the purpose of putting the screw on the Defendants, the trustees, and compelling them to give a high price for the shares which the Plaintiff purchased. I cannot state, nor do I know, how far that allegation is well founded or not, but I do not see how that can enable the Court to say that the Plaintiff is not entitled to his legal rights, merely because his object in asserting them is to obtain a higher price for his property. People as a general rule who wish to increase the value of their property by bringing trustees to an account, are desirous, no doubt, of obtaining some money by it, but it does not matter, as far as this question is concerned, whether the money is obtained by payment by the trustees to the Plaintiff or whether it is obtained by increasing the value of the reversionary interests which the Plaintiff is entitled to sell. It seems to me that argument cannot deprive the Plaintiff of his legal rights, whatever they may be.

The result, therefore, will be that he, having instituted the first suit *bonâ fide* and not improperly, will be entitled to the conduct of the decree which was obtained—I do not like to use the term "collusively" because it has a bad sense—but which was obtained by consent as a friendly decree and without opposition. I am quite satisfied this was not done improperly, but I quite understand that the Plaintiff in the second suit was very anxious to obtain a decree as soon as possible, the trustees being willing, and not improperly so, to assist her. That being so, it seems to me the proper order to make will be to give the Plaintiff, Mr. *Storer*, in the first action the conduct of this action. To save expense it would now be proper that he should give an undertaking to stay

proceedings in the first action, and the costs of all parties in the first action to be costs in this action.

COTTON, L.J.:—

In this case the Respondents admitted, as they could not help doing, the general rule, that where there are two suits to administer an estate and the decree is submitted to in the second, the Plaintiff in the first gets the conduct of the proceedings. That is not an inflexible rule; and under special circumstances the Court can act as, under the special circumstances, it thinks right, but that is the general rule. It was said here that the general rule does not apply where one suit is in the Palatine Court and the other is in the Chancery Division, or where the suits are in any other two Courts. In my opinion that is erroneous. If each Court is competent to administer the estate the rule applies. The rule was laid down for the purpose of preventing parties racing in order to get the conduct of proceedings to administer an estate. That would increase expense and must be checked, and therefore, in my opinion, the rule applies to this case, though the first suit was in the Palatine Court and the second suit, the suit in which the decree was taken, was in the Chancery Division.

The only other question is whether there are any special circumstances which would require us to depart from that general rule; but the special circumstances which were mentioned and urged on the part of the Respondents, have been so fully dealt with by the Master of the Rolls, that I do not think it necessary to refer to them again.

LINDLEY, L.J.:—

I am of the same opinion. I concur in the order which has now been made, and will say nothing except with reference to the suggestion which fell from Mr. *Davey*, that the Plaintiff in the second action should have the conduct of the second action, except so far as regards those inquiries in which the Plaintiff in the first action was more particularly interested or desirous of proceeding. It appears to me that that would not be a proper order for us to make, because it would add very materially to the

C. A. 1882 — *In re* SWIRE. — MELLOR *v.* SWIRE.

expense to give one person the conduct of the administration decree up to a certain point, and to give another person the conduct of certain inquiries which are involved in the working out of that decree. That would be very onerous and oppressive. It appears to me that Mr. *Storer* ought to have the conduct of the second action, the first being stayed in the way suggested for the reasons which have been given.

Solicitors for Appellant: *Johnson & Weatherall*, agents for *G. R. Lloyd, Manchester.*

Solicitors for Plaintiff *Mellor*: *Sharpe, Parkers, Pritchard, & Sharpe*, agents for *Peace, Ackerley, & Co., Wigan.*

Solicitors for trustees: *Pritchard, Englefield, & Co*, agents for *Gartside, Manchester.*

M. W.

In re WHITTAKER.
WHITTAKER *v.* WHITTAKER.

[1881 W. 2866.]

V.-C. B.
1882
April 28, 29.
May 2, 3.

Will—Legacy—Interest—Husband and Wife—Separate Estate—Evidence.

Under a bequest of £1000 upon trust to invest the same upon mortgage of the *B.* borough fund, and pay the interest as the same should arise to his widow during her life and widowhood, and after her death or second marriage in favour of testator's children by a former marriage, interest does not become payable to the widow except from the end of a year from the testator's death.

In the absence of proof of an unequivocal, complete, and final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not after his death, upon her uncorroborated statement that he expressly authorized her to carry on the business, on her own account, of a farm which she had rented before marriage, and to treat the proceeds as her separate property, admit her claim as against his estate to the proceeds of the farm which were invested by him during his lifetime.

THOMAS WHITTAKER, who died on the 2nd of February, 1881, by his will, dated the 11th of October, 1876, after giving all his real and personal estate to his executors, *William Whittaker* and *Thomas Marsland*, upon trust for sale, directed that the money to arise from the sale of his estates, and any other moneys which he might have, or be possessed of or entitled to at his death, should be secured by his executors and disposed of, as to £1000 part thereof upon trust to invest the same upon mortgage of the *Burnley* corporation estates and borough fund, and to pay the interest as the same should arise therefrom to his wife *Elizabeth* (the Plaintiff) during her life, but so long only as she should remain chaste and his unmarried widow, and after her death, or marriage again, or becoming unchaste, testator gave one moiety to his son, the said *William Whittaker*, absolutely, and the other moiety upon the same trusts for his daughter and her issue, and upon failure of her issue for his son and his issue in the same manner as thereinafter declared with respect to a moiety of the remainder of the trust property, which remainder was given, as to one moiety to his son absolutely, and as to the other to his daughter and her children, and failing issue of the daughter her

V.-C. B. 1882

In re WHITTAKER. WHITTAKER *v.* WHITTAKER.

moiety to go to the son absolutely, and if the son should then be dead, to the son's children.

The Plaintiff, who was the testator's second wife, had brought this action against the executors, claiming to have a sum of £1000, which was at the time of the testator's death actually invested in corporate property of the borough of *Burnley*, appropriated to answer her legacy with interest as from his death. She also claimed to prove as a creditor on the estate in respect of certain moneys (£450 and £82) alleged to have formed part of her separate estate, and to have been lent by her to the testator for purposes of investment, and to have a piano and other chattels in the house at the time of the testator's death delivered up to her as having been given to her by him during his lifetime.

Previous to her marriage with the testator in 1873 the Plaintiff had carried on a milk and poultry farm near *Burnley*, and it was alleged by her that the testator, who upon the marriage came to reside upon the farm, agreed that she should carry on the business on her own account, and that the stock and profits should be her separate estate. There was no settlement or written contract to this effect, either before or after the marriage, but evidence was given of conversations in which the testator spoke of the property as belonging to the Plaintiff, and also that the testator did not take, and in fact was physically incapable of taking, any part in the business, but left it all to be managed by the Plaintiff. On the other hand evidence was given on behalf of the Defendants to the effect that the testator occupied the position of master on the farm, and was in the habit of going into *Burnley* on business connected with the farm, and took upon himself to buy and sell cattle without any assistance or interference on the part of the Plaintiff. The effect of this evidence, which was very conflicting, is stated in the judgment. In 1875 the farm was given up, and the stock was sold, and the proceeds of sale and the valuation price paid by the incoming tenant, amounting to about £450, were received by the testator and invested by him, as the Plaintiff alleged, for her use. These investments, together with two sums of £70 and £12, stated to have been lent to him by her out of her separate estate resulting from the profits of the farm, to enable him to make up the amounts of two mortgages which he

was at the time taking up, were claimed by the Plaintiff in this action. The Plaintiff also claimed delivery to her of a piano, as having been given to her by the testator on condition that she would learn to play upon it, and also certain articles of furniture which had been given to her by the testator, and were in the house at the time of his death.

Everitt, Q.C., and *Colt*, for the Plaintiff:—

The interest given to the Plaintiff by the will is sufficient to entitle her to an administration judgment: *Humfrey* v. *Humfrey* (1); *Re Turner* (2).

Interest on the £1000 runs from the testator's death, there being what amounts to a clear severance of the fund for the benefit of the Plaintiff, who took an immediate vested interest therein: *Dundas* v. *Wolfe Murray* (3).

With the consent of the testator, and as part of an ante-nuptial arrangement between herself and him, the Plaintiff continued to carry on the farming business after her marriage, on her own account separately from her husband, precisely in the same way as before marriage, and she is therefore entitled to prove against his estate for the sums lent to the testator out of the savings of the business which belonged to her as her separate property: *Slanning* v. *Style* (4); *Ashworth* v. *Outram* (5); *Lovell* v. *Newton* (6); *Woodward* v. *Woodward* (7); there being no right in a husband, or on the part of his estate, to recover (in this case to retain) savings of the wife's separate estate: *Brooke* v. *Brooke* (8). The Plaintiff is entitled to the piano as a gift to her from her husband, who expressly told one of the witnesses that he had given it to the Plaintiff on condition that she would learn to play on it: *Grant* v. *Grant* (9).

Horton Smith, Q.C., and *E. S. Ford*, for the Defendants, the executors:—

Interest upon the £1000 is not due to the Plaintiff until the

(1) 2 Dr. & Sm. 49.
(2) Ibid. 501.
(3) 1 H. & M. 425.
(4) 3 P. Wms. 334.
(5) 5 Ch. D. 923.
(6) 4 C. P. D. 7.
(7) 3 D. J. & S. 672.
(8) 25 Beav. 342.
(9) 34 Beav. 623.

V.-C. B. 1882 *In re* WHITTAKER. WHITTAKER *v.* WHITTAKER.

end of two years from the testator's death, there being a distinction in this respect between a legacy for life with remainder over, and the gift of an annuity which commences from the death, so that the first payment is due at the end of the year: *Gibson* v. *Bott* (1); and there is no authority for giving interest to the wife rather than to any one else, from the testator's death: *Lowndes* v. *Lowndes* (2). *Dundas* v. *Wolfe Murray* (3) is distinguishable, as in that case there was an absolute gift of a fund which was severed from the rest of the estate immediately from the testator's death for the benefit of the objects of the gift.

The claim by the Plaintiff against the estate of her deceased husband in respect of the proceeds of the farming business, cannot be admitted, as it is supported only by the Plaintiff's uncorroborated testimony, upon which alone, after the death of the testator, the Court has constantly refused to act: *Grant* v. *Grant* (4); *Hill* v. *Wilson* (5); *Gray* v. *Warner* (6); *Stevens* v. *Morson* (7).

Even if the testator left the control of the business to the Plaintiff, and allowed her to carry on the farm (a dairy farm) and receive the profits—which is by no means established by the evidence—that did not make the profits her separate estate: *Barrack* v. *M'Culloch* (8). The *Married Women's Property Act* does not assist the Plaintiff, as it only applies to the case of the earnings of a business carried on separately from her husband, or to property belonging to her before marriage which, by writing under his hand, he shall have agreed shall belong to her after marriage as her separate property (*Married Women's Property Act*, 1870, s. 11); and the evidence shews that the testator did not abnegate his position as owner of the farm, but was in the habit of buying stock and attending to the business. In order to render valid a voluntary gift *inter vivos*, the donor must have done everything which was necessary in order to transfer the property and divest himself of the legal ownership. He may either actually transfer the property to the person whom he intends to

(1) 7 Ves. 89.
(2) 15 Ves. 301.
(3) 1 H. & M. 425.
(4) 34 Beav. 623.
(5) Law Rep. 8 Ch. 888.
(6) Law Rep. 16 Eq. 577.
(7) 26 Sol. J. 25.
(8) 3 K. & J. 110.

benefit, or he may transfer the property to a trustee for such person, or lastly, he may by one or other of the modes recognised as amounting to a valid declaration of trust, which must be final, irrevocable, and complete: *Grant* v. *Grant* (1), constitute himself a trustee for that person. But in order to render the gift binding one or other of these modes must be resorted to, and if the gift is intended to be effectuated in one way, the Court will not give effect to it by applying another of those modes: *Milroy* v. *Lord* (2); *Warriner* v. *Rogers* (3); *Richards* v. *Delbridge* (4); *Moore* v. *Moore* (5). The distinction between cases of imperfect gift and cases of declaration of trust is marked and clear, and where the gift is incomplete by the property not having been effectually transferred, the Court will not support it as a trust declared in favour of the donee: *Moore* v. *Moore*; *Breton* v. *Woollven* (6). *Fox* v. *Hawks* (7), where a deed of assignment of property by a husband about to leave *England* to his wife "to hold the same to her separate estate," was held to operate as a valid declaration of trust in favour of the wife, does not apply to a case like this where the husband and wife were living together. Moreover, not the slightest claim to the farming business was made by the Plaintiff in her husband's lifetime, nor until the statement of claim was delivered. The piano and chattels in the house at the time of the testator's death form part of his estate, and were not effectually given to the Plaintiff: *Breton* v. *Woollven*.

Everitt, in reply:—

In *Milroy* v. *Lord* and the other cases cited there were documents which shewed the nature of the transaction, and by the terms of which the Court was bound, but here the evidence shews a clear intention on the part of the husband that the business should be held and managed by the wife as belonging to her for her separate use. Upon the evidence, we submit that an unequivocal declaration of trust in favour of the Plaintiff was made by the testator.

(1) 34 Beav. 623. (4) Law Rep. 18 Eq. 11.
(2) 4 D. F. & J. 264. (5) Law Rep. 18 Eq. 474.
(3) Law Rep. 16 Eq. 340. (6) 17 Ch. D. 416.
(7) 13 Ch. D. 822.

V.-C. B. 1882 *In re* WHITTAKER. WHITTAKER *v.* WHITTAKER.

BACON, V.C. —

Several matters have been here discussed, but the point whether this is a proper case for administration cannot, in my opinion, be questioned. The widow has a right to bring an administration action, and she has done so. It is not disputed that she has the right, and if it were I should decide that she has it. Then another question is as to the interest on the £1000. All that has been said on behalf of the Plaintiff upon that is very plausible and very reasonable. Nothing can be more clear than the law as it stands upon the decided cases, that the first payment of interest upon a legacy does not become due until two years after the testator's death, and that in the case of a wife there is no difference whatever. In *Stent* v. *Robinson* (1) a fund of £10,000 was left by testator to trustees to be invested by them for the benefit of his wife in trust to pay the income to her half-yearly during her life for her separate use, and there, without much question, Sir *William Grant*, M.R., dismissed the petition, and said there was nothing to support the proposition that a legacy to a wife bears interest from the death of the testator, except the *dictum* of Lord *Alvanley* in *Crickett* v. *Dolby* (2), and that there was no authority to support that *dictum*, notwithstanding the numerous instances of legacies given to wives. There are of course cases where an immediate intention to provide for the support of the wife may be reasonably attributed to the testator; but where it only stands as a legacy by the testator the law forbids me to say that interest can run upon it until from the end of the first year after the testator's death.

The most important matter that has been discussed is the claim to what has been called the wife's separate estate. That is covered by a multitude of decisions, many of which have been referred to in the course of the discussion, and the law stands clearly established that a husband may, no doubt, constitute himself a trustee for his wife of any property whatsoever, hers or his, or anything else that he has a right to deal with; but in order to do that there must be some proof furnished of a clear unequivocal determination and intention of the testator so to constitute himself a trustee. That cannot be reasonably implied from any

(1) 12 Ves. 461. (2) 3 Ves. 10, 16.

circumstances which are not pregnant and distinct in themselves nor without some plain statement on the part of the husband. Another well-established rule is that a person making a claim against the estate of a dead man cannot sustain that claim by his or her own deposition. Unless there be some corroboration of it, something to satisfy the Court that the assertion is literally true, the Court can take no notice of it, nor give any relief upon it.

The circumstances of this case are somewhat remarkable. A woman who had a farm of no great value, as is quite clear from the evidence, a farm carried on for the purpose of supplying milk to the neighbourhood, contracts marriage with the testator, and she says that it was bargained between them that all her property should remain hers, notwithstanding the marriage. Well, of that there is no kind of corroboration. There is no other evidence of a previous contract, there is only the statement of the wife. After the marriage was contracted there is evidence that the testator said to a man who was working in the fields or engaged on the farm with the cows, or in some way connected with it: "I have married your mistress; I am an independent man, I do not want any of her property," and so on, and that is repeated several times. Then the farm goes on in the state in which it was for a year and nine months. During that time, it is very clearly in evidence that the husband bought and sold cattle. He bought from *Crabtree* and *Stansfield* (who were called as witnesses), and he sold to *Barrett* the butcher. He was in the habit of going into *Burnley*, and there ordering provender, and during all this time, by whom does not appear, the rent and taxes of the farm were paid; but it does appear from the evidence of the Plaintiff's witnesses that the milk which was from time to time supplied to the customers was carried from the farm by the men working there, and that the money was received by them from the customers and handed over invariably to their mistress, and in no case to the husband. Well, now, attaching the utmost weight to that state of circumstances that it is possible to ascribe to it, it is at least entirely ambiguous. The husband, in doing what he did, in buying cattle and in ordering provender, may have done no more than assist his wife in carrying on the farm for her own benefit; or he may, though I cannot say that he did, have acted

V.-C. B. 1882 *In re* WHITTAKER. WHITTAKER *v.* WHITTAKER.

as trustee, or he may have acted as master and have dealt with it in these matters as much for his own benefit as hers. But however it was, it is clear that the utmost harmony always subsisted between them, and that there was never any dispute between them. So matters go on, and nothing occurs to affect the allegation of the Plaintiff that she was to have for her own use the farm and all it produced. Then we come to the latter part of 1874, when the husband and wife, I suppose, agreed, at all events it is not suggested that they did not agree, that the farm should be given up, and that the whole of the stock and effects there should be sold off. They were accordingly sold, the husband employing the auctioneer who conducted the sale, and receiving from him and from the incoming tenant the proceeds of the sale, and the amount which the incoming tenant would have to pay on taking possession—a sum of between £400 and £500. Then the parties go to live first at *Blackpool* and then at *Burnley*, and nothing is said, during the whole period from February, 1873, when the marriage was contracted, until February, 1881, when the testator died, between them upon this subject of the proceeds of the sale.

A witness was called on behalf of the Plaintiff whose evidence is remarkable, but it does not seem to me in the slightest degree to corroborate the statements of the Plaintiff. Mrs. *Betty Whittaker* states that the husband had said that he had nothing to do with the farm, that his wife managed it; that he took no part in the management, "that he said the farm was his wife's, that he had plenty of his own money and did not want his wife's, that it was hers." On a visit which the witness paid to them at *Blackpool*, "he said he had put the money produced from the farm out to use, that it was her money"—at this time he was paying her £2 a week for housekeeping—"he said all her money and his were on mortgage securities, for they brought in the most money;" and then having asked the witness if her husband had made a will, he said, "I have made my will, I have left my wife £1 a week and her own money as long as she remains a widow." But nobody can say that the moneys had ever been kept apart; on the contrary when he speaks of his testamentary dispositions he includes in them what he calls his wife's money as well as his

own. If it was his he had a right to make a will dealing with it; if it was not his I do not know why he should have so expressed it. But I am dealing with this as an instance of what is said to be corroboration of the wife's testimony, and it appears to me not to be so. So matters go on until the testator's death. Until that time nothing had taken place between the parties; there was no claim by the wife, no recognition by the husband, no single fact upon which I can rely for the purpose of corroborating that which is the claim in this suit. The husband dies somewhat suddenly, and the wife when the will is read, asks "What provision has been made for me? He has promised to leave me a residence, and he has not done so," but at that time no claim whatever was made by her to this separate estate. Now, bearing in mind the leading principle that the unsupported testimony of a claimant against a dead man's estate cannot be held to be sufficient to establish the claim, where am I to find in the whole of this evidence anything like corroboration of the Plaintiff's statement? She says moreover that she lent him £80 upon one occasion, and another sum upon another, and it seems to me by no means improbable that she did, although I cannot admit her single testimony as proof of it. I cannot say that I entertain any moral doubt that she did on those two occasions, to make up the *Blackpool* mortgage by Miss *Pollard*, lend him those sums. But that does not amount to evidence which would support this claim against a dead man's estate. Upon that part of the case, therefore I think the claim of the Plaintiff is not made out. But the case does not quite rest there, because in the conversations which took place after the testator's death when she and the son, the Defendant, were talking together, the widow made no distinct claim to that which she now asserts is her property. I am aware that there is a conflict of evidence to some extent upon that between the Defendant's solicitor and the solicitor of the Plaintiff with regard to whether or not she said she had lent money to the testator to make up those mortgage securities. Upon that I can come to no conclusion. I find that they differ in their statements with regard to it. [His Lordship after commenting severely on the conduct of the Defendant, the testator's son, to the Plaintiff in charging her with theft, and turning her without means out of

V.-C. B. 1882 *In re* WHITTAKER. WHITTAKER *v.* WHITTAKER.

the house while the testator was still lying there unburied, proceeded:—] With regard to the piano, I think it was given to the Plaintiff, and I think so notwithstanding *Breton* v. *Woollven* (1), in which there was a memorandum by the husband saying, "I this day make you a present of all my plate, &c.," and so on, but that was held not to be a valid gift against the estate. I think this is entirely different. This cannot properly be said to be an article of furniture, although no doubt it is often made to serve that purpose or used for mere decoration; but here it was given upon this condition: "if you like to learn to play upon it, I will give you this piano." Nobody has disputed that she did learn to play upon it. The extent to which her musical studies progressed is not a matter to be inquired into by me; but as it was so given to her, it is quite as much an item of property of her own as if it had been a brooch or a ring, and she would not forfeit it any more than she would a guitar or a violin. It was hers for her personal use, and upon the terms that she complied with that condition which I have mentioned, and I think therefore that she is entitled to the piano. I do not think any other part of the case has been established, and all I can do now is to direct the common administration decree and the restitution of the piano.

Horton Smith, Q.C., asked for a declaration that interest on the £1000 investment ran only from the expiration of one year from the testator's death.

BACON, V.C.:—It is not in the least necessary. In my opinion, the question about the interest on the legacy is not arguable. I can find nothing in the will but a gift of the entirety of the testator's estate, a direction to realize that estate, and out of that estate to set apart a legacy of £1000 for the wife.

Solicitors: *Warriner & Cross*, for *Hodgson, Burnley*; *Dow & Co.*, for *Backhouse & Procter, Burnley.*

(1) 17 Ch. D. 416.

F. G. A. W.

BROWN *v.* BURDETT.

V.-C. B.
1882
Aug. 2.

[1875 B. 152.]

Will—Direction to Trustees to block up a House for Twenty Years—Declaration of Intestacy—Wills Act (1 *Vict. c.* 26), *s.* 3 [*Revised Ed. Statutes, vol. viii., p.* 31.]

Testatrix devised a freehold house, yard, garden, and outbuildings, to trustees and their heirs, upon trust to block up all the rooms of the house (except four rooms in which she directed that a housekeeper and his wife should be placed in occupation), and the coach-house, for twenty years; and subject thereto upon trust for a devisee in fee. She directed her trustees to visit the house and premises once in every three months to see that the trusts were effectually carried out, and declared that if any trustee should neglect or refuse to carry out the trusts aforesaid, any real or personal estate given or intended to be given to him by the will should go to the persons therein named, absolutely.

Held, that there was an intestacy as to the twenty years' term in the house, yard, garden, and outbuildings.

ANN MARIA BURDETT, late of *Gilmorton*, in the county of *Leicester*, widow, by her will dated the 22nd of May, 1868, devised, *inter alia*, twelve messuages at *Bruntingthorpe*, *Leicestershire*, to *Thomas Worth* (since deceased) for life, remainder to *Ann*, his wife, for life, remainder as to several of the houses to *Thomas Brown*, and as to the rest to the several persons therein named. She further devised a messuage or tenement and carpenter's shop at *Gilmorton* to *Thomas Ward* (afterwards revoked) for life, remainder to *Richard Burdett* (since deceased) for life, remainder to *Martha Ann Burdett* for life, remainder to *Ann Maria Burdett* absolutely. She also devised (1) a messuage or tenement, yard, garden or orchard, and outbuildings, then in her own occupation at *Gilmorton*, (2) a messuage at *Bruntingthorpe*, (3) several closes of land at *Bruntingthorpe*, (4) several closes of land at *Shearsby*, and (5) all other her real estate whatsoever and wheresoever, to *Thomas Baxter* absolutely. She made a bequest of her personal estate, and appointed the above-named *Thomas Brown*, *Richard Burdett*, and *Thomas Baxter* her executors.

By a codicil, dated the 26th of September, 1868, she revoked the devise of the house at *Gilmorton* in her own occupation, and

V.-C. B. 1882 BROWN v. BURDETT.

gave and devised the same, with the yard, garden, orchard, outbuildings, and appurtenances thereto belonging, and also all her household goods and furniture, linen, china, and other household "effects and carriages" that might be in and about the same at her decease, unto the said *Richard Burdett*, *Thomas Brown*, and *Thomas Baxter*, upon trust that they, and the survivors and survivor of them, and the heirs, executors, or administrators of such survivor, their or his assigns, should immediately after her funeral and upon the same day remove or cause to be removed out of her said messuage or tenement all her plate, jewellery, trinkets, and watches, to be disposed of as in her said will was mentioned. She then proceeded as follows:—

"And then upon further trust immediately after my funeral and on the same day (so far as may be practicable, provision having been made for that purpose immediately on my decease) to cause the windows and doors in each and every room in and about my said messuage or tenement (except the doors and windows belonging to the kitchen, back-kitchen, middle attic, and hall), and the coachhouse belonging thereto, to be well and effectually bricked up from the outside in a good and substantial manner, with every article of whatever kind that may then be therein (including my clock) at my decease, and to cause the same to be repaired and renewed when and as occasion shall require; and so bricked up, to continue for the term of twenty years next after my decease, and subject to the trusts aforesaid upon trust to place in (and remove at pleasure) some respectable married couple, to be selected by my said trustees or trustee, or a majority of them from time to time, in the actual occupation of the said kitchen, back-kitchen, middle attic, and hall, and to allow them to live therein and to occupy the same, and also the yard, garden, and other outbuildings belonging to my said messuage or tenement, rent free, in consideration of their taking care of the said messuage or tenement and premises, and particularly the blockade to the said doors and windows; and to see that the same are in nowise tampered or meddled with, and upon any such meddling or tampering, or any need of repairs, or otherwise, forthwith to give notice to my said trustees thereof, in order that the same may be immediately attended to, and from and after the determination of

the said term of twenty years, and subject to the trusts as aforesaid, I give and devise my said messuage or tenement with the yard, garden, orchard, carriage-house, outbuildings, and appurtenances now in my own occupation, unto and to the use of the said *Richard Burdett* and his assigns, during his natural life, and after his decease and the determination of the same term of twenty years, and subject to the trusts aforesaid, unto and to the use of the said *Thomas Baxter*, his heirs and assigns for ever; and I direct and require one of my said trustees to visit and inspect my said messuage or tenement and premises once in every three months to see that the trusts hereinbefore contained are effectually carried out."

Testatrix made another codicil, dated the 22nd of May, 1871.

After again devising the same house, garden, orchard, outbuildings, and furniture to the same three persons, upon the like trusts as above stated to remove her plate, jewellery, trinkets, and watches, she continued:—

"And then upon further trust, as soon as may be after my funeral and on the same day as far as practicable, and in their personal presence, and also of *Thomas Worth* of *Bruntingthorpe*, he having been previously requested to attend my funeral (provision having been made to that end immediately after my decease), to proceed to cause all the windows in and about the said premises (except the doors and windows belonging to the kitchen, back-kitchen, middle attic, and hall) to be closely and effectually boarded up and nailed with good long nails to be bent down on the inside; the inside shutters to be closed, and then covered up with sheet-iron and zinc, the window in my bedroom in the back to be removed, and the opening to be bricked up as part of the wall, the fireplace in my bedroom to be effectually bricked up, and then the door closed and bricked up in a good and substantial manner; the opening from the kitchen to my bedroom to be covered by zinc or iron a foot larger each way than the opening, and then bricks to be stacked upon it, and mortared down or cemented: the several doors to be sealed up with large boards screwed with long screws, and sealed with seals, one to be provided for that purpose by each of my trustees, and each seal to

V.-C. B. 1882 BROWN v. BURDETT.

be a distinct seal from the other; the chimneys to have a piece of slate placed over them so as to effectually cover them and then bricked over and cemented; and I direct all the said articles of furniture, linen, china, and carriages hereinbefore mentioned, and that may be inside the rooms so directed to be blocked up as aforesaid at my decease, including my clock, shall be kept therein, and not be removed therefrom; and I direct that the work so directed to be done shall be renewed and repaired as and when occasion shall require so as to keep the same in a good sufficient and effectual state of repair for the term of twenty years next after my decease; and subject to the trusts and directions aforesaid upon trust that they, my said trustees and the survivors and survivor of them and other the trustees or trustee for the time of this my will, do and shall place some respectable married couple (with full power to remove at pleasure) to be selected by them or him my said trustees or trustee, or a majority of them from time to time as occasion shall require, in the actual occupation of the said kitchen, back-kitchen, middle attic, and hall; and to allow them to live therein, and to occupy the same and also the yard, garden, orchard, and other outbuildings belonging thereto, at a nominal rent of one halfpenny per week, in consideration of their taking care of the said messuage or tenement and premises, and particularly the blockade to the said doors, windows, chimneys, and other places therein, and to see that the same are in nowise tampered or meddled with, and upon any meddling or tampering therewith, or any need of repairs, forthwith to give notice thereof to my said trustees or trustee, in order that the same may be immediately attended to; and from and after the determination of the said term of twenty years, and subject to the trusts aforesaid, I give and devise my said messuage or tenement with the yard, garden, orchard, carriage-house, outbuildings and appurtenances, now in my own occupation, unto and to the use of the said *Richard Burdett* and his assigns during his natural life, and after his decease, but subject to the said term of twenty years, and to the trusts aforesaid, unto and to the use of the said *Thomas Baxter*, gent., his heirs and assigns for ever. And I direct and require one of my said trustees to visit and inspect my said messuage or tenement and premises once in every three months

to see that the trusts hereinbefore contained are effectually carried out; Provided always, and I do hereby declare my mind and will to be, that if and in case my said trustees or any one or more of them shall neglect or refuse to carry out the trusts of this my codicil in reference to my real and personal estate at *Gilmorton* aforesaid by this codicil disposed of, that then and in such case any real or personal estate by me given or intended by my said will or this codicil for such trustee so neglecting or refusing, shall go to, and I do hereby give and devise the same, unto *Henry Penfold* of *Brighton* in the county of *Sussex*, surgeon; *Charles Bloxsom* of *Gilmorton* aforesaid farmer, and *Martin Bloxsom* (son of Mrs. *Martin Bloxsom* of *Gilmorton* aforesaid), their respective heirs, executors, administrators, and assigns, for ever, according to the nature and quality thereof respectively, to be equally divided between them share and share alike as tenants in common."

By a third codicil dated the 22nd of December, 1871, testatrix directed that her just debts (other than any mortgage debt that might be upon her real estate at *Gilmorton*) funeral and testamentary expenses and legacies should be chargeable upon and payable out of all her real estate in manner following, that was to say:—one equal third part thereof upon the twelve messuages or tenements at *Bruntingthorpe* aforesaid, by her said will devised to *Thomas Worth* for his life; and "after his decease" one other equal third part thereof upon her real estate situate at *Gilmorton* aforesaid; and the other and remaining equal third part thereof upon her residuary real estate; and she gave to the trustees of her will a power of raising by mortgage of the three properties respectively such sum as might be required.

Testatrix died on the 16th of January, 1872.

Probate of the will and codicils was, after a protracted litigation, granted on the 5th of May, 1875, to *Richard Burdett* and *Thomas Baxter*, two of the trustees and executors, leave being reserved to the third trustee and executor, *Thomas Brown*, to come in and prove.

On the following day, the 6th of May, 1875, the bill was filed by *Thomas Brown* against his co-trustees and executors, *Richard Burdett* and *Thomas Baxter*, for administration.

V.-C. B. 1882 BROWN v. BURDETT.

On the 12th of June, 1875, probate was granted to the Plaintiff, *Thomas Brown*.

An administration decree was made on the 21st of November, 1876.

In 1877 or 1878 the first Defendant, *Richard Burdett*, died, and before the 15th of April, 1880, *Thomas Worth* died.

On the 16th of June, 1882, the Chief Clerk made a certificate.

One of the questions arising upon further consideration was as to how the costs of the suit, including the costs of the proceedings in the Probate Court, if they should be allowed, were to be borne.

Millar, Q.C., and *Brett*, for the Plaintiff:—

A question calling for the decision of the Court, is, whether what the testatrix has called "the blockade" of her house and coach-house at *Gilmorton* is to be maintained. She has directed a forfeiture if either of the trustees should neglect or refuse to carry out this trust.

There appears no reason why a direction of this sort should not be carried out under the sanction of the Court.

Hemming, Q.C., and *Yate Lee*, for the Defendant *Thomas Baxter*.

E. K. Karslake, Q.C., and *M. R. Phillips*, for the co-heiresses-at-law, who had obtained leave to attend.

A. G. Langley, for *Henry Penfold*, who had also obtained leave to attend:—

I represent the class who are to take in the event of forfeiture through neglect of the trustees to maintain this so-called "blockade."

Amongst the invalid and illegal conditions referred to and collected in *Jarman* on Wills (1), nothing resembling this is to be found; and there is no authority against such a direction as this.

Marten, Q.C., and *Samuel Hall*, for *Ann Worth* and *Martha Ann Burdett*, tenants for life, who had also obtained leave to attend:—

There is an intestacy as to the twenty years' term in the house

(1) 4th Ed. vol. ii. pp. 13–43.

and premises at *Gilmorton;* and the unexpired residue of this term will form a fund which will be first applicable towards payment of debts and testamentary expenses, including costs: *Jarman* on Wills (1).

The Court will disregard a direction the effect of which is to make this property useless for the remainder of the term of twenty years.

The language of the *Wills Act* is precise: "It shall be lawful for every person to devise, bequeath, or dispose of, by his will," all real estate and all personal estate (sect. 3); and to make the statute applicable there must be a "disposition" of some sort. Here there is no disposition of any kind. The consequence is, that this is an intestacy.

Millar, in reply:—

It cannot be truly said that the property is in terms undisposed of. It is in fact given to trustees, with directions to take care of it, and to repair it; and they are to provide, and if necessary, remove, the housekeepers.

BACON, V.C.:—

I think I must "unseal" this useless, undisposed of property.

There will be a declaration that the house and premises were undisposed of by the will, for the term of twenty years from the testatrix's death.

Solicitors: *Woodall; Brownlow & Howe; C. T. Foster; Clarke & Calkin*, agents for *Clarke & Howlett, Brighton.*

(1) 4th Ed. vol. ii. p. 622.

J. B. D.

V.-C. H.
1882
March 7.

WAITE *v.* BINGLEY.

[1879 W. 316.]

Partition—Disputed Title—Co-tenant in Common, Mortgagee of Entirety—Australian Bankruptcy—Real Estate in England—Will of Realty—Evidence.

24 W.R. 178

Where a tenant in common of a freehold messuage subject to a mortgage in fee, had procured the transfer of the mortgage to himself and was in possession thereunder, his co-tenant in common was held entitled in a partition action to a sale of the property subject to the mortgage.

Real estate in *England* does not vest in an assignee under a Victorian insolvency.

For the purposes of the usual preliminary judgment in a partition action letters testimonial of the Supreme Court of the Colony of *Victoria*, Probate Jurisdiction, setting out the will verbatim, were accepted as sufficient proof of a will made in *Victoria* of real estate in *England*.

PARTITION ACTION.

John Anthony Waite, who died in 1852, by his will, dated in 1846, devised and bequeathed all the real and personal estate to which he should be entitled at the time of his decease, and particularly his freehold messuage No. 4, *Old Burlington Street, London*, unto *Charles Derby Waite* and another (since dead), their heirs, executors, and administrators, upon trust to pay the rents and profits thereof to his mother during her life, and after her death to his sisters who should be living at the death of his mother, and the survivors of them, during their respective lives, and after the death of the survivor of them upon trust to convey the same unto, between, and amongst all his brothers who should be living at the time of his decease.

The testator's mother died on August the 18th, 1853. At that time there were five of his sisters living, the survivor of whom, *Emily Anne Waite*, died in May, 1879. There were five brothers of the testator living at the time of his death, each of whom became entitled under the aforesaid devise to one equal fifth part or share in the aforesaid messuage in remainder expectant upon the death of the survivor of the testator's said five sisters.

One of these brothers *William Henry Waite*, died in the colony of *Victoria, Australia*, in August, 1868, having by his will made in

Victoria given all his real and personal property to his wife (who died in November, 1878), for her life, and after her death equally amongst his children. And he left three children, who were the infant Plaintiffs *Edith*, *Anne*, and *Arthur Charles Waite*.

Two others of these brothers were *Thomas Waite* and *Archibald Waite*, each of whom during the life of the testator's surviving sister sold his reversionary one fifth share in the freehold messuage No. 4, *Old Burlington Street*, to one *Corbett*, by whom the life interest therein of the surviving sister was also purchased, and *Corbett* sold and conveyed this life interest and these two reversionary fifth shares to the Defendant, *Charles Bentley Bingley*.

At the time of the death of *John Anthony Waite*, the messuage No. 4, *Old Burlington Street* was subject to two mortgages in fee simple created by indentures dated respectively the 25th day of June, 1846, and the 30th day of May, 1848, and after his purchase from *Corbett* the Defendant procured the mortgage debts due under these indentures and the securities for the same to be respectively assigned and conveyed to him by the parties respectively entitled thereto.

This action was brought by the three infant children of *William Henry Waite* by *Charles Derby Waite*, their next friend, against *Charles Bentley Bingley* to have a partition made under the direction of the Court of the said freehold messuage, and all other if any of the real estate devised in undivided shares by the will of the said *J. A. Waite*, or to have such messuage and real estate (if any) sold under the direction of the Court, and the net proceeds thereof divided between or secured for the benefit of the parties respectively entitled thereto. By their statement of claim the Plaintiffs claimed to be entitled subject to the said mortgages to nine twenty-fifth parts or shares of the said messuage, being the one fifth (or five twenty-fifths), derived by them through their father in manner hereinbefore mentioned, together with four other twenty-fifth parts or shares, their title to which is not material for the purposes of this report. And they averred that the Defendant was or claimed to be entitled to two fifths (or ten twenty-fifths) of the said messuage and to the legal estate in fee simple in the entirety thereof, and stated that he was at the time of

V.-C. H. 1882 WAITE v. BINGLEY.

the death of *Emily Anne Waite*, the surviving sister, in occupation of the messuage under a lease thereof for a term of four years from the 25th of December, 1877, if *Emily Anne Waite* should so long live, and that he still continued in possession thereof, although the term had determined, and that he ought to be charged with an occupation rent for the same.

The Defendant in his statement of defence admitted that the Plaintiffs' father, *W. H. Waite*, became entitled to one fifth share in the said messuage in remainder expectant upon the decease of the survivor of his five sisters, but he did not admit the devolution of this share from *W. H. Waite* to the Plaintiffs, and he claimed in effect not only the two fifth shares, his title to which was undisputed, but also (*inter alia*) the one fifth claimed by the Plaintiffs under the title hereinbefore stated. He did this in manner following:—He set forth an indenture dated the 3rd of October, 1878, being his conveyance from *Corbett*, from the recitals to which it appeared that the estate of the Plaintiffs' father, *W. H. Waite*, had been on the 11th of July, 1865, placed under sequestration by the Supreme Court of *Victoria*, Insolvency Jurisdiction, and that by an indenture dated the 20th of June, 1872 (which it will be noticed was nearly four years after the death of *W. H. Waite*), and made between *R. S. Jacomb*, "one of the official assignees of insolvent estates for the colony of *Victoria*," of the one part, and *Corbett* of the other part, *Jacomb*, "in whom all the estate and interest of the said *W. H. Waite* of and in the share and interest thereinafter mentioned was then vested," in consideration of £250 paid to him by *Corbett*, purported to convey to *Corbett* and his heirs "all the share and interest of him the said *R. S. Jacomb*, as such official assignee as aforesaid, of and in the said messuage and hereditaments, No. 4, *Old Burlington Street*." The indenture of the 3rd of October, 1878, then conveyed the messuage No. 4, *Old Burlington Street*, subject to the two mortgages, to the use of the Defendant his heirs and assigns, during the life of the said *E. A. Waite* (the surviving sister) and after her death as to two fifths to the use of the Defendant in fee, and as to the residue to the use of the Defendant, his heirs and assigns, for all the estate and interest of *Corbett* (if any) therein under the indenture of the 20th of June, 1872, or otherwise. And the Defendant claimed the two fifths,

his title to which was admitted, and all other the estate and interest in the said messuage conveyed to him by the said indenture of the 3rd of October, 1878. The Defendant also stated that he was willing and able to account for all moneys properly chargeable against him in respect of the premises after keeping down the interest on the incumbrances to all such persons as should prove to be interested therein.

The Plaintiffs proved their pedigree by certificates and affidavits of identity, and as evidence of the will of *W. H. Waite* they tendered a document, sealed with the seal of the Supreme Court of the colony of *Victoria*, commencing with the words: "To all to whom these letters testimonial shall come. . . . The Honourable the Supreme Court of this colony of *Victoria*, to which Court Probate Jurisdiction in such matters as are herein set forth is specially given, sends greeting, and wills that undoubted faith be given to these presents, and does make known . . . that in searching the registry of the Supreme Court of the Colony of *Victoria* amongst the records thereof . . . hath been found . . . that on the 14th day of December, 1876 . . . at *Melbourne* . . . before the said Court . . . the last will of *William Henry Waite*, of . . . who died . . . was proved . . . and that probate was granted to . . . which said will follows in these words:" Then followed the will verbatim, including the attestation clause, and these words: "In faith and testimony of all and singular the premises we have caused these our present letters testimonial to issue and be corroborated and confirmed by affixing thereto the seal of the Supreme Court of *Victoria* aforesaid. Given at *Melbourne*, in the said colony of *Victoria*, as to the time of the aforesaid search and seeking of these presents, this 6th day of July, 1880. *Fredk. Wilkinson*, Master in Equity of the Supreme Court of the Colony of *Victoria*. I, the Honourable Sir *W. F. Stawell*, Knight, Chief Justice of the Supreme Court of the Colony of *Victoria*, do hereby certify and attest that *Frederick Wilkinson*, who has signed the foregoing letters testimonial, is Master in Equity of the Supreme Court of the Colony of *Victoria*, and that full faith and credit ought to be given to the said letters testimonial in Court and out. Dated at *Melbourne*, in the colony of *Victoria*, this 7th day of July, 1880. *William F. Stawell*."

V.-C. H. 1882 WAITE v. BINGLEY.

Hastings, Q.C., and *W. Worsley Knox*, for the Plaintiffs:—

The Plaintiffs have sufficiently proved the devolution to them of their father's share, which is all that was necessary for them to do; and they are entitled to a judgment directing inquiries in the usual form as to the persons interested, and to a sale when all such persons are either parties or served, or service has been dispensed with. The case falls within the 3rd section of the *Partition Act*, 1868 (which gives the Court power to order a sale instead of partition); and we ask for judgment in the form adopted in *In re Hardiman* (1); *Pemberton* on Judgments (2), with the addition, if the Defendant requires it, of inquiries as to his incumbrances; the sale being, of course, freed from or subject to those incumbrances, as the case may be.

W. Pearson, Q.C., and *Bradford*, for the Defendant:—

We dispute the title of the Plaintiffs, and a disputed question of title cannot be tried in an action for partition: *Evans* v. *Bagshaw* (3). The Plaintiffs could not have had a partition at Common Law. The Defendant is in possession as mortgagee of the entirety, and the Court cannot decree partition as against his legal title. This is in fact ejectment under the guise of partition, and the Plaintiffs ought first to have established their title. The jurisdiction to order partition rests upon the power to take physical possession, so that the Court could send its officers upon the property to make partition: *Evans* v. *Bagshaw*; *Taylor* v. *Grange* (4). Again, partition will not be decreed at the suit of a next friend on behalf of a person under disability: *Halfhide* v. *Robinson* (5). There the person under disability was of unsound mind: but an infant is within the principle.

Moreover, there is no sufficient evidence of the will of the Plaintiffs' father, under which they claim. The proper way to prove a will of lands is by production of the original will, with proof of its due execution; and if the original cannot be produced by reason of its being in the archives of some Court beyond the jurisdiction, to apply to that Court for its production, and if pro-

(1) 16 Ch. D. 360.
(2) 3rd Ed. p. 324.
(3) Law Rep. 8 Eq. 469; 5 Ch. 340.
(4) 13 Ch. D. 223; 15 Ch. D. 165.
(5) Law Rep. 9 Ch. 373.

duction is refused, to put in evidence the fact of such refusal, and after proving the due execution of the will, to prove its contents by means of an examined copy. The only other method of establishing a devise is to give notice under 20 & 21 Vict. c. 77, s. 64, of intention to give in evidence the probate of the will or a duly stamped copy thereof. Neither of these courses has, however, been adopted.

Lastly, the Defendant is entitled to the shares claimed by the Plaintiffs, because during their father's lifetime all his estate vested in the assignee under his Australian bankruptcy, by whom it was conveyed to the Defendant's vendor.

Hastings, in reply:—

None of the cases cited on the other side are applicable.

In *Evans* v. *Bagshaw* (1) the Plaintiffs were reversioners without any title to relief at the time of the filing of the bill.

In *Taylor* v. *Grange* (2) there was an active overriding power and trust still in existence, against which the Court could not decree partition.

Halfhide v. *Robinson* (3) was the case of a person of unsound mind not found so by inquisition, and the proper jurisdiction was under the *Lunacy Regulation Act;* which was all that was there decided.

Partition at the suit of infants is of common occurrence, and the 6th section of the *Partition Act*, 1876, expressly enables requests for sale or undertakings to purchase to be given on behalf of infants or persons under other disability by next friends or other persons duly authorized to act for them.

It is true that the Defendant disputes our title; but we have proved it, and there is no authority for the proposition that no one can have partition whose title is not admitted.

As to the mortgages, a tenant in common cannot by getting in a mortgage in fee over the entirety, deprive his co-tenant in common of his right to partition. The old cases as to partition against a legal title are no longer applicable, and, moreover, we do not seek to affect the Defendant's title as mortgagee, but only

(1) Law Rep. 8 Eq. 469; 5 Ch. 340. (2) 13 Ch. D. 223; 15 Ch. D. 165.
(3) Law Rep. 9 Ch. 373.

V.-C. H. 1882 WAITE v. BINGLEY.

to sell subject to or discharged from his mortgage, as the case may be.

As to the Victorian insolvency. The devolution of real estate is governed by the *lex loci rei sitæ*, and an insolvency in *Australia* does not affect the bankrupt's lands in *England: Cockerell* v. *Dickens* (1); *Dicey* on Domicil (2). That the estate of *W. H. Waite* did not vest in his Victorian assignee is moreover shewn by the Victorian statute 34 Vict. No. 379, passed on the 29th of December, 1870, under which the Court is empowered in a proper case, upon the application of the trustee, to order the insolvent to convey his real estate situate out of the colony so as to enable the trustee to make it available for the creditors (see sect. 101). But this Act was not passed until more than two years after the death of *W. H. Waite*, and of course no proceeding ever could have been or could be taken under it. Lastly, the will of the Plaintiffs' father is sufficiently proved, at all events for the purpose of the judgment we propose to take. The letters testimonial of the Victorian Court (of whose seal this Court will take cognizance) shew in effect upon the face of them that the original will is in the archives of that Court, and out of the jurisdiction, and after stating that it had been admitted to probate, they set forth its contents verbatim. So they may either be treated as an examined copy of the very highest character, or as a duly stamped copy, in which latter case the omission to give notice would be a mere technical objection to remove which the hearing might, if necessary, be adjourned.

HALL, V.C.:—

The Plaintiffs in this case claim to be entitled under the will of their father, *William Henry Waite*, to certain undivided shares in property in this country, formerly belonging to *John Anthony Waite*, and they seek as against the Defendant (who has vested in him certain undivided shares of the same property), in lieu of partition, to have this property sold under the direction of the Court. The title of the Plaintiffs to sustain this action is disputed. One ground of dispute is that the Defendant is not merely the owner of certain undivided shares, but is also mortgagee of the

(1) 3 Moo. P. C. 98; S. C. 1 M. D. & D. 45. (2) Page 346.

entirety, and that such being the case, he is not liable to have brought against him an action of this description, which it is said will in some way interfere with his title as mortgagee. As I understand this action, however, it is not and has not been sought in any way to affect his title as mortgagee. It is not sought to redeem him, and, as I conceive, a property which is in mortgage, but which belongs to the owners of the equity of redemption in certain undivided shares, is capable of being made the subject of a partition action without touching or interfering with the mortgage at all. That is what the Plaintiffs desire and seek to do, and which I consider they are competent to do. The objection, therefore, in respect of the mortgage, seems to me to be without foundation. It is said that the cases which have been referred to of persons coming for realisation by means of sale, are similar to this case, and prevent these Plaintiffs under such circumstances from getting relief in a partition action; but it seems to me that these are all cases of a different class. First of all, as regards those cases in which the Court has said that relief could not be granted as against a legal title, and that a person could not be allowed, under the guise of a partition action, to bring an action of ejectment, I may observe that the fact of the Court not having such actions within its cognizance at the time when some of the cases were decided, was in itself an ample reason for its declining to interfere in such cases, and telling the Plaintiff that he must proceed by ejectment and establish his title there, and then might come for partition. In that state of the jurisdiction, therefore, it can be easily understood that the Court would not interfere. But those cases now have no application at all to the jurisdiction administered in this Court. The sale asked for is not a sale of a reversionary interest, which it was in one of the cases which have been referred to, nor is it a case in which the parties beneficially interested are seeking, by what they are doing, to destroy the substantial arrangement for enjoyment which has been made by the person through whom they all claim, and to whose will they are bound to give effect, which was the second description of case which has been referred to. We have none of those features in this case.

It is said, however, that the Plaintiffs' case entirely fails, for

V.-C. H. 1882 WAITE v. BINGLEY.

the property does not belong to them at all, because while their father was in *Australia* his estate was placed under sequestration for the benefit of creditors by the Insolvency Court of *Victoria;* and it is contended that the property, in some way or other, became vested in the official assignee of insolvent estates in *Australia.* Now, even supposing the statements in the defence to be proved, it seems to me not only that that contention is not made out, but that the contrary is the just conclusion. The just conclusion from all that has been stated and explained to me on this head is that although this property in *England* of the Plaintiffs' father might possibly have been got at by some separate and independent proceeding to be taken in *Australia* (which of course would not have been allowed unless for good cause), under which the father of the Plaintiffs, if he was alive, might have been called upon to make it over and transfer it to this Australian assignee, no such application ever was made, and the Plaintiffs' father is dead. Under these circumstances I consider that the property did not vest in the assignee under the Australian insolvency, or pass by the transfer from him. It appears to me, therefore, that there is no impediment at all to the Plaintiffs' title by reason of their father's alleged insolvency, and if so, it follows that this property passed by his will, and upon the construction of that will I hold it to be plain that (subject to the life interest of his widow) it passed to his children who survived him. Those children are the Plaintiffs in this action, and therefore they are entitled under that will.

If that be so, the only remaining matter is this: it is said that the will is not sufficiently proved in evidence. Well, I will not say that that may not deserve some further consideration at a future time if this Defendant should be advised not to admit that will upon the present evidence, but to put the Plaintiffs to some further proof of it. But if further proof is required, which I do not apprehend it will be, I think the Defendant will run great risk, under the circumstances of this case, of having to pay the costs of that proof. However, I leave that to be dealt with when it arises, as I have a strong impression that any Court in this country, for such a purpose as the present, would hold that the will was sufficiently proved. At all events, I think it would hold

it sufficiently proved for the purpose of making a judgment which is not actually final but only preliminary, though founded, no doubt, upon what has satisfied the Court for this purpose as to the title of the Plaintiffs.

The whole result is that the Plaintiffs have established their title to judgment, which will be in the form adopted by the Master of the Rolls in *In re Hardiman* (1), in which judgment may be inserted, as a favour to the Defendant, that the sale is to be subject to his mortgages, and as preliminary to that, that there is to be an inquiry as to mortgages. That will certainly relieve him from the great anxiety which he seems to be under in his character of mortgagee, as to the property being sold over his head. I think that disposes of the whole of the matters which I have to consider.

The order as drawn up was, so far as material, as follows :—

Upon &c., and the Plaintiffs who claim to be interested in the hereditaments in the pleadings mentioned by their counsel requesting a sale thereof, and a distribution of the proceeds, instead of a division of the said hereditaments among the parties interested, this Court doth order that the following inquiries and accounts be made and taken, that is to say :—

1. An inquiry what were the hereditaments devised in undivided shares by the will of the said *John Anthony Waite*, deceased, the testator in the pleadings named?

2. An inquiry who are the persons interested in the said hereditaments respectively, and for what estates and interests, and in what shares and proportions, and whether they are parties to this action?

3. An inquiry whether it will be more beneficial to the persons interested that the said hereditaments should be sold, and the proceeds of the sale distributed among them, or that a division of the said hereditaments should be made.

4. An inquiry what incumbrances affect the entirety of the said hereditaments, or any and what part thereof?

5. An account of what is due to such of the incumbrancers as shall consent to the sale (if any) hereinafter directed in respect of their incumbrances.

6. An inquiry what are the priorities of such last-mentioned incumbrancers.

And in case it shall be certified that all persons interested are parties to this action, and that it will be beneficial to have a sale of the said hereditaments, It is ordered that the said hereditaments be sold with the approbation of the Judge, free from the incumbrances of such of the incumbrancers as shall consent, and subject to the incumbrances of such of them as shall not consent, and that the

---

(1) 16 Ch. D. 360.

V.-C. H. 1882 WAITE v. BINGLEY.

money to arise from such sale be paid into Court to the credit of this action, "*Waite* v. *Bingley*, 1879 W. 316."

And if such money or any part thereof shall arise from hereditaments sold with the consent of incumbrancers, the money so arising is to be applied in the first place in payment of what shall appear to be due to such incumbrancers according to their priority.

But in case it shall be certified that some of the persons interested are not parties to this action, any of the persons interested are to be at liberty after it shall have been certified that all persons who are not parties, and who ought to be served with notice of this order, have been so served, or that service of such notice has been dispensed with, to apply to the Judge at Chambers for an order for the sale of the said hereditaments.

And it is ordered that the further consideration of this action be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

Solicitors: *Walters, Deverell, & Walters; Hemsleys.*

W. W. K.

KETTLEWELL *v.* WATSON.

FRY, J.

[1879 K. 65.]

1882

Jan. 24, 25, 26, 27, 28, 30; Feb. 1.

Vendor's Lien for Unpaid Purchase-money—Sub-Purchaser—Land in Register County—West Riding Registry Act (2 & 3 *Anne, c.* 4) [*Revised Ed. Statutes, vol. ii. p.* 116]—*Release of Lien on Part of Land—Constructive Notice—Imputed Notice—Notice through Solicitor or Agent—Purchaser for Value without Notice—Evidence—Onus Probandi.*

A vendor of land situate in a register county, part of whose purchase-money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers who have notice of it, actual or constructive.

And such a vendor will not, by registering the conveyance to his purchaser, if he retains the deed in his possession, lose his lien as against sub-purchasers from the original purchaser.

Land, belonging to the trustees of a charity, situate in the suburbs of *Leeds*, in the West Riding of *Yorkshire*, was sold by the trustees, with the sanction of the Charity Commissioners, to some estate agents, who occupied a good position in *Leeds*. They bought the land with the intention of reselling it in small lots for building purposes. A receipt for the whole purchase-money, signed by the vendors, was indorsed on the conveyance, but only part of it was in fact paid. The vendors retained the deed in their possession, but, at the request of the purchasers, the vendor's solicitors registered a memorandum of it in the West Riding Registry. The vendors took no written security for their unpaid purchase-money, but relied only on their equitable lien. The purchasers sold the land again in lots, some of which were very small. None of the sub-purchasers had actual notice of the lien of the original vendors:—

Held, that the original vendors were entitled to enforce their lien against such of the sub-purchasers as had constructive notice of it.

One of the sub-purchasers, who bought a small lot for £42, allowed the purchasers at their suggestion to employ their own solicitor to prepare the conveyance to him. He did not in any other way employ a solicitor in the matter, and he made no inquiries about the title or the deeds, nor did he search the register:

Held, that, under these circumstances, it was not the duty of the solicitor to communicate the existence of the lien to the sub-purchaser, and that consequently notice of it could not be imputed to him through the solicitor:

Held also, that, having regard to all the circumstances, and especially to the smallness of the purchase-money, and the expense which a regular investigation of the title would have occasioned, it could not be said that the sub-purchaser had wilfully abstained from making inquiries with the view

SC as to validity of notice of appeal 7 Ch D 192 C A

FRY, J.
1882
KETTLEWELL
v.
WATSON.

of not receiving notice of any prior charge, and that, consequently, he could not be fixed with constructive notice of the original vendor's lien, but was entitled to hold his plot free from it.

Another sub-purchaser employed no solicitor in the matter, and made no inquiries himself, but, as he said, left it to the original purchasers "to manage the business," and they prepared the conveyance to him, charging him for it:

Held, that he had made them his general agents in the matter, and that it was their duty as such to communicate the lien to him; that, consequently, it must be assumed that they did so, and that notice of the lien must be imputed to him.

The conveyances to the sub-purchasers contained the ordinary covenant by the original purchasers that the plots conveyed were free from incumbrances:

Held, that the covenantors not being solicitors, the fact that they entered into this covenant, though it was very improper for them to do so, did not, coupled with the other circumstances, shew that they were parties to a fraudulent scheme so as to rebut the legal presumption that they communicated the lien of the original vendors to the sub-purchasers for whom they acted as general agents, and that, consequently, the doctrine of *Kennedy* v. *Green* (1) did not apply.

The vendors at the request of two of the sub-purchasers released the plots which they purchased from the lien:

Held, that, it not being shewn that, when these releases were given, the vendors knew that the original purchasers had parted with any other portions of the land, the releases did not affect the right of the vendors to enforce their lien against the other sub-purchasers.

The action was brought by the original vendors against some of the sub-purchasers to enforce the lien against them. The Plaintiffs in their statement of claim alleged that three of the sub-purchasers, whose conveyances were expressed to be made for value, had in fact given no consideration for them, and they adduced evidence which proved this allegation in the case of one of the three:

Held, that, under the circumstances, the *onus* was on the Plaintiffs to prove the allegation in the case of the other two, and that they had failed to do so.

The doctrine of imputed and constructive notice discussed.

THIS was an action by vendors of land to enforce a lien for unpaid purchase-money.

The Defendants were persons who had derived title to different portions of the land from the original purchasers. The land was situate in the neighbourhood of *Leeds*, in the West Riding of *Yorkshire*.

The Plaintiffs were the trustees of a charity at *Leeds*, known as

(1) 3 My. & K. 699.

Jenkinson's Hospital, and were seised of the land in that character. On the 21st of June, 1872, they entered into an agreement (subject to the approval of the Charity Commissioners) to sell the land, which contained about four acres, to *B. H. Richardson & T. H. Watson*, in fee, for £2523, and a deposit of £223 was then paid to the Plaintiffs. *Richardson & Watson* were land and estate agents occupying a good position at *Leeds*. On the 20th of August, 1872, the Charity Commissioners made an order authorizing the sale, and it was thereby ordered that the purchase-money, when received by the trustees, should be forthwith paid by them to the banking account of "The Official Trustees of Charitable Funds," at the *Bank of England*, by whom the same should be forthwith invested in the purchase in their names of consols, to be held by them in trust for the charity, and subject to the further order or direction of the Commissioners.

On the 15th of November, 1872, a deed was executed by which the trustees, in consideration of £2523, expressed to be paid to them by *Richardson & Watson* on or before the execution of the deed, conveyed the land to *Richardson & Watson* in fee, to hold the same, as to one undivided moiety thereof, to the use of *Richardson* in fee, and, as to the other undivided moiety thereof, to the use of *Watson* in fee. There was indorsed on the deed a receipt for the whole £2523, signed by the trustees. In fact nothing was then paid to the Plaintiffs in addition to the deposit. After the execution of the deed it was retained by the Plaintiffs' solicitors as a protection to the Plaintiffs' lien for the unpaid balance of the purchase-money. On the 1st of January, 1873, *Richardson & Watson* paid the Plaintiffs a further sum of £800 on account of the purchase-money. The remaining £1500 was never paid by *Richardson & Watson*, but they continued to pay the Plaintiffs interest on it. On the 10th of January, 1873, the Plaintiffs' solicitors, at the request of *Richardson & Watson*, registered a memorial of the purchase deed in the West Riding Registry at *Wakefield*.

Richardson & Watson afterwards sold the whole of the land in small portions to various persons, some of whom were the Defendants to this action. The Plaintiffs alleged that such of those persons as were not made Defendants to the action had acquired

FRY, J.
1882
KETTLEWELL v. WATSON.

the portions which they had purchased without any notice of the Plaintiffs' lien.

By a deed dated the 14th of January, 1873, *Richardson & Watson* granted 128 square yards of the land to *Timothy Watson* in fee, the purchase-money being £42. He did not employ any solicitor in the matter, but he allowed *Richardson & Watson*, at their suggestion, to employ their own solicitor to prepare the conveyance to him. He had no actual notice of the Plaintiffs' lien, and he made no inquiries about the title or the deeds, nor did he search the register. He died on the 30th of October, 1880, after the commencement of the action, having devised his real estate to his wife, the Defendant *Diana Watson*.

By a deed dated the 16th of January, 1873, *Richardson & Watson* granted 180 square yards of the land to the Defendant *William Watson* in fee, the purchase-money being £42. He did not employ any solicitor in the matter, but he allowed *Richardson & Watson*, at their suggestion, to employ their own solicitor to prepare the conveyance to him. He had no actual notice of the Plaintiffs' lien, and he made no inquiries about the title or the deeds, nor did he search the register.

By a deed dated the 11th of December, 1873, *William Watson* granted the 180 square yards to the Defendant *Eliza Ainley* in fee, by way of mortgage. She had no actual notice of the Plaintiffs' lien.

By a deed dated the 1st of January, 1874, *Richardson & Watson* granted 825 square yards of the land to *A. F. Holroyd* in fee, and by another deed dated the same day they granted other 821 square yards of the land to *Holroyd* in fee. He was a clerk in the office of *Richardson & Watson*, but it was not proved that he had any actual notice of the Plaintiffs' lien. He, in fact, gave no consideration for the conveyance to him, though each of the deeds purported to be made in consideration of £200 paid by him.

By a deed dated the 27th of February, 1874, *Holroyd* granted the 825 square yards to the Defendant *James Padgett* in fee, by way of mortgage, and by another deed dated the 30th of March, 1874, *Holroyd* granted the 821 square yards to *Padgett* in fee, by way of mortgage. *Padgett* had no actual notice of the Plaintiffs' lien. In his answer to interrogatories administered to him by the

Plaintiffs, he said that he did not employ any solicitor to act for him on the respective occasions of his mortgages, but that he left it to *Richardson & Watson* to manage the business, though he did not give them any authority to employ a solicitor on his behalf.

By two deeds dated respectively the 1st of April, 1874, *Holroyd* granted the 825 square yards and the 821 square yards respectively to the Defendant *Jane Hartley Carr* in fee, subject respectively to the mortgages to *Padgett*. She had no actual notice of the Plaintiffs' lien, and she, like *Padgett*, did not employ any solicitor, but left it to *Richardson & Watson* to manage the business.

By a deed dated the 29th of September, 1873, *Richardson & Watson* granted 1280 square yards of the land for value to *Henry Hatherley* in fee. By a deed dated the 30th of September, 1873, *Hatherley* granted the 1280 square yards to *Alfred Law* and others in fee, by way of mortgage, and on the 18th of November, 1873, he granted the 1280 square yards for value to the Defendant *Jane Hartley Carr* in fee, subject to the mortgage of the 30th of September, 1873. The Plaintiffs admitted that the mortgagees under that deed took their mortgage without any notice of the Plaintiffs' lien, but they alleged that both *Hatherley* and *Jane Hartley Carr* took their interests in the 1280 square yards with actual and constructive notice of the lien. The Plaintiffs alleged also that *Hatherley* gave no value for the conveyance to him, but they adduced no evidence to prove this. It was proved that *Jane Hartley Carr* had no actual notice of the lien, but that she, like *Padgett*, left it to *Richardson & Watson* to manage the business.

By a deed dated the 12th of February, 1874, *Richardson & Watson* granted 765 square yards of the land to *Holroyd* in fee. It was not proved that he when he took this conveyance had any actual notice of the Plaintiffs' lien, but he gave no consideration for the conveyance, though it purported to be made for value. By a deed dated the 13th of February, 1874, *Holroyd* granted the 765 square yards to *William Eastwood* in fee, by way of mortgage. There was no evidence that *Eastwood* employed any solicitor or agent in reference to his purchase. He had no actual notice

FRY, J.
1882
KETTLEWELL v. WATSON.

of the Plaintiffs' lien, but he made no inquiries as to the title or the deeds, and he did not search the register. He died on the 25th of December, 1876, having devised all estates vested in him by way of mortgage to the Defendants *Elizabeth Eastwood*, *L. A. Shepherd*, and *C. H. Marriott*, in fee, subject to the equities affecting the same, and having appointed the same three Defendants his executors.

By a deed dated the 2nd of September, 1874, *Holroyd* granted the 765 square yards to *Joseph Roberts* in fee, subject to the mortgage to *William Eastwood*. *Roberts* died on the 31st of May, 1878, having by his will devised all his real estate to the Defendants *James Roberts*, *H. H. Wylde*, and *William Richardson* in fee, upon certain trusts, and having appointed them also his executors.

By a deed dated the 3rd of November, 1874, *Richardson & Watson* granted 690 square yards of the land to *Henry Gallon*, in fee, the conveyance purporting to be made to him for value, and he by a deed dated the 4th of November, 1874, granted the same to *Padgett* in fee, by way of mortgage, and on the same day *Gallon* conveyed the equity of redemption for value to the Defendant *Mary Edwards* in fee, which equity of redemption she on the 14th of February, 1879, mortgaged to the Defendant *Joe Haworth*. The Defendants *Mary Edwards* and *Haworth* delivered no pleading, and did not appear. The Plaintiffs alleged that both *Gallon* and *Padgett* acquired the 690 square yards with actual and constructive notice of the Plaintiffs' lien. They did not at the trial prove actual notice against either of them, but they proved that *Padgett* acted in the same manner with reference to this mortgage as he did with respect to the mortgages which he took from *Holroyd*. The Plaintiffs alleged that *Gallon* in fact gave no value for his conveyance, but they did not attempt to prove this allegation at the trial.

By a deed dated the 1st of December, 1874, *Richardson & Watson* granted 763 square yards of the land for £200 to *Hatherley* in fee, and he, on the 31st of December, 1874, granted the same to *Jane Ainley* in fee, by way of mortgage, to secure £800, and on the 11th of March, 1876, *Hatherley* conveyed the 763 square yards for £300 to *Henry Taylor* in fee, subject to the mortgage, and he, on the 15th of March, 1878, mortgaged his equity of redemption

to the Defendants the *Midland Banking Company*. *Taylor* afterwards filed a liquidation petition, under which the Defendants *John Gordon* and *William Armistead* were appointed trustees of his property. They delivered no pleading and did not appear.

The Plaintiffs alleged that both *Hatherley* and *Jane Ainley* acquired their interests in the 763 square yards with actual and constructive notice of the Plaintiffs' lien. In the opinion of the Court it was proved that *Jane Ainley* had constructive notice of the Plaintiffs' lien by reason of her having, like *Padgett*, left it to *Richardson & Watson* to manage the business, but the Court held that the Plaintiffs had failed to prove that *Hatherley* had any notice of their lien.

By a deed dated the 5th of September, 1877, *Richardson & Watson* granted 688 square yards of the land, for value, to the Defendant *R. J. Chippendale*. He authorized *Richardson & Watson* to employ their solicitor to prepare the conveyance, but he in no other way employed any solicitor in the matter. He had no actual notice of the lien, but he made no inquiries as to the title or the title deeds, and he did not search the register.

By a deed dated the 27th of November, 1874, *Richardson & Watson* granted 846 square yards of the land for £190 to *Henry Taylor*, in fee, and he, on the 21st of May, 1875, conveyed the same, with other property, to *D. Davis* and *William North*, in fee, by way of mortgage to secure £2300, and on the 15th of March, 1878, he mortgaged his equity of redemption to the Defendants the *Midland Banking Company*. The ultimate equity of redemption became afterwards vested in the Defendants *Gordon* and *Armistead* as trustees in the liquidation of *Taylor*. The Plaintiffs admitted that *Davis* and *North* acquired their mortgage for value without any notice of the Plaintiffs' lien, but they alleged that *Taylor* acquired the 846 square yards with actual and constructive notice of the Plaintiffs' lien. In the opinion of the Court, however, the Plaintiffs failed to prove this allegation.

By a deed dated the 13th of August, 1875, *Richardson & Watson* granted 636 square yards of the land for £119 to *Taylor* in fee, and he, on the 7th of March, 1876, conveyed the same to *Eliza Hatton* in fee, by way of mortgage to secure £850, and, on the 15th of March, 1878, he mortgaged his equity of redemption

FRY, J.
1882
KETTLEWELL
v.
WATSON.

of the 636 square yards to the Defendants the *Midland Banking Company*. The ultimate equity of redemption became afterwards vested in the Defendants *Gordon* and *Armistead*, as trustees in the liquidation of *Taylor*. The Plaintiffs admitted that *Eliza Hatton* acquired her mortgage without any notice of their lien, but they alleged that *Taylor* acquired the 636 square yards with actual and constructive notice of the lien. In the opinion of the Court, however, the Plaintiffs failed to prove this allegation.

On the 17th of February, 1879, *B. H. Richardson* filed a liquidation petition, under which his creditors appointed a trustee of his property. On the 12th of April, 1878, *T. H. Watson* filed a liquidation petition, under which a trustee was appointed, but on the 19th of May, 1879, he was adjudicated a bankrupt. The Plaintiffs proved in respect of their lien against the estates of *B. H. Richardson* and *T. H. Watson*, but no dividend had been paid by their estates.

The conveyances to the various purchasers from *Richardson & Watson* were respectively registered soon after their execution.

At different times two solicitors, named *Asling* and *Bladen*, acted for *Richardson & Watson*, and were employed by them to prepare conveyances to the sub-purchasers.

The Plaintiffs claimed a declaration that they were entitled to a lien or charge on the said several lands of the Defendants respectively for the sum of £1500, and interest thereon from the 1st of July, 1878, and their costs of the action; and that in default of payment by the Defendants, or some or one of them, the said several lands of the Defendants might be ordered to be sold, and the proceeds of sale applied in or towards payment of the £1500, interest and costs.

In answer to interrogatories administered to them by some of the Defendants, the Plaintiffs admitted that in two instances of sales by *Richardson & Watson* of portions of the land comprised in the deed of the 15th of November, 1872, viz., a sale in January, 1873, of 1310 square yards to one *Joseph Wood*, and a sale, in August, 1874, of 1856 square yards to one *Benjamin Wright*, the Plaintiffs' solicitors allowed the conveyances to be made freed from the Plaintiffs' lien. But, in the opinion of the Court, there was no evidence that, when the Plaintiffs thus released their lien,

they had any notice that other parts of the land had been sold by *Richardson & Watson* to other persons.

Some of the Defendants alleged that the Plaintiffs were by acquiescence and *laches* debarred from any relief to which they might otherwise have been entitled, on the ground that they, with knowledge and notice of the facts, stood by and allowed the property to be built on, and the deed of the 15th of November, 1872, to be registered for the express purpose of enabling *Richardson & Watson* to sell or mortgage the property in lots.

Cookson, Q.C., *W. G. Harrison*, Q.C., and *Langworthy*, for the Plaintiffs:—

There was no negligence in our not having our lien evidenced by some written document which could be registered. We were entitled to rest on our equitable lien, and were under no obligation to do anything more, and under the Act 2 & 3 Anne, c. 4, nothing can be registered but a written document: *Sumpter* v. *Cooper* (1); though there need not necessarily be a deed: *Credland* v. *Potter* (2). And the circumstance that we, at the request of *Richardson & Watson*, allowed the conveyance to them to be registered, did not, so long as we retained that deed in our possession, amount to any representation to any one who searched the register that the property was free from any vendor's lien, and cannot operate to deprive us of our lien. The Defendants, however, do not say that they searched the register. And the fact that *Richardson & Watson* had not possession of the conveyance to them was notice to any one dealing with them that there might be a vendor's lien for unpaid purchase-money. Though the Defendants have registered their conveyances the registration will not avail to defeat our prior equity if they took with notice, actual or constructive, of our lien: *Le Neve* v. *Le Neve* (3). We prove constructive notice of our lien against all the Defendants. Some of them employed *Richardson & Watson* as their agents, and they necessarily employed a solicitor to transact the business. When the employment of an agent is such that he must necessarily employ a sub-agent, the sub-agent is the agent of the original

(1) 2 B. & Ad. 223. (2) Law Rep. 10 Ch. 8.
(3) 1 Amb. 436.

FRY, J.
1882
KETTLEWELL v. WATSON.

principal, and notice to him is notice to the principal. We prove that the solicitors employed by *Richardson & Watson* knew that part of our purchase-money was unpaid. But, if *Richardson & Watson* were the only agents, still the doctrine of imputed notice through an agent applies to lay agents equally with solicitors: *Brotherton* v. *Hatt* (1); *Jennings* v. *Moore* (2). These cases are commented upon in *Le Neve* v. *Le Neve* (3) and adopted as good law. The test is whether it is the duty of the agent to disclose what he knows to his principal: if it is, the Court will assume that he did so, and that is an irrebuttable presumption: *Wyllie* v. *Pollen* (4).

[FRY, J.:—There is no magic in the agent being a solicitor.]

It is a question of common honesty: *Rolland* v. *Hart* (5). And, if the agent's duty conflicts with his interest, it will still be presumed that he performed his duty: *Bradley* v. *Riches* (6). The fact that the agent is not a paid agent makes no difference.

But, even if any of the Defendants employed no agent, still they must be taken to have had constructive notice of our lien. They should have inquired for the conveyance to *Richardson & Watson*, and if they had done so they would have learnt that it was in the possession of our solicitor.

[FRY, J.:—Must I not consider all the circumstances of each case? *Agra Bank* v. *Barry* (7). There it was held that the mere non-production of the title deeds of an estate, when they were inquired for, was not enough to postpone a legal mortgagee to a prior equitable mortgagee with whom the deeds had been deposited.]

There inquiry was made, and a reasonable excuse was offered for the non-production of the deeds. But here no inquiry was made at all: *Jones* v. *Smith* (8). If a person designedly abstains from making inquiries, if he wilfully shuts his eyes in order that he may not receive notice, the Court will impute notice to him of those facts of which he would have received notice if he had inquired. And there may be negligence so gross that the Court

(1) 2 Vern. 574.
(2) Ibid. 609.
(3) 1 Amb. 436.
(4) 3 D. J. & S. 596.
(5) Law Rep. 6 Ch. 678.
(6) 9 Ch. D. 189.
(7) Law Rep. 7 H. L. 135.
(8) 1 Hare, 43.

will treat it as evidence of fraud, though there is no moral fraud: *West* v. *Reid* (1); *Hewitt* v. *Loosemore* (2); *Worthington* v. *Morgan* (3); *Peto* v. *Hammond* (4). In the case of the Defendant *Jane Hartley Carr*, she had constructive notice of our lien, even if her grantors had not. Only an equity of redemption was conveyed to her, and our equity is as good as hers, and, being prior in date, it ought to prevail: *Phillips* v. *Phillips* (5); *Cave* v. *Cave* (6). This applies to others of the Defendants.

Glasse, Q.C., *W. Barber*, Q.C.. and *Lockwood*, for the Defendants, *Elizabeth Ainley*, *James Padgett*, *Jane Hartley Carr*, *L. A. Shepherd*, *C. H. Marriott*, and *Jane Ainley*:—

The omission of the Plaintiffs to obtain some written document to evidence their lien for unpaid purchase-money, and their relying only on their equitable lien is a species of fraud, and is sufficient to deprive them of their lien. They enabled *Richardson & Watson* to shew a good title on the register: *Hine* v. *Dodd* (7). The register is notice to everybody. The fact that the Plaintiffs registered the purchase deed at the request of *Richardson & Watson* is at any rate enough to deprive them of their lien: *Smith* v. *Evans* (8).

As to constructive notice, the mere fact that one and the same solicitor is employed by both vendor and purchaser is not sufficient to prove that the purchaser had constructive notice of an equity affecting the vendor. The principle of constructive notice through a solicitor has been said to rest on the duty of the solicitor to communicate to his principal; in *Boursot* v. *Savage* (9), Vice-Chancellor *Kindersley* said that the true principle is that the solicitor is the *alter ego* of the client. The doctrine of constructive notice through a solicitor will not be extended, and the *onus* is on those who allege the employment of a solicitor to prove it: *Wyllie* v. *Pollen* (10). The doctrine of *Le Neve* v. *Le Neve* (11)

(1) 2 Hare, 249.
(2) 9 Hare, 449.
(3) 16 Sim. 547.
(4) 30 Beav. 495.
(5) 4 D. F. & J. 208, 215.
(6) 15 Ch. D. 639.
(7) 2 Atk. 275.
(8) 28 Beav. 59.
(9) Law Rep. 2 Eq. 134.
(10) 3 D. J. & S. 596.
(11) 1 Amb. 436.

FRY, J.
1882
KETTLEWELL
v.
WATSON.

may not be confined to a solicitor, but there is a great distinction between a solicitor agent and a lay agent. Notice of a legal difficulty affecting the title to land may operate very differently on the mind of a lay agent and on the mind of a lawyer.

The fact that the land is in a register county is very material. In *Agra Bank* v. *Barry* (1) Lord *Hatherley* pointed out (2) that there is a very great distinction with regard to the imputation of knowledge between land which is in a register county and land which is not.

[FRY, J.:—Those observations of Lord *Hatherley* are addressed to the constructive notice which is inferred from the omission to make inquiries—not to the notice which is imputed through an agent.]

A purchaser of land in a register county is not bound to make inquiries about unregistered instruments, and, in the absence of actual notice to him or his agent, his registered deed is entitled to priority over a prior unregistered charge: *Lee* v. *Clutton* (3).

The Court must have regard to all the facts. Here the original vendors were trustees of a charity, selling land subject to the trust under an order of the Charity Commissioners, and the order expressly required that the purchase-money should be invested in a particular way. It might fairly be assumed by any ordinary person that this had been done.

Again, all the sub-purchasers ought to have been made parties to the action: *Peto* v. *Hammond* (4). *Richardson & Watson* were committing a fraud, and that rebuts the presumption that, if they were our agents, they would communicate the lien to us: *Kennedy* v. *Green* (5).

As to the different Defendants for whom we appear, the case wholly fails as against *Eastwood's* executors; there is no evidence that he employed either *Richardson & Watson*, or any solicitor, as his agents in the matter.

This applies to others of our Defendants.

James Padgett acquired his title through a purchaser for value and was himself a purchaser for value. Notice is not proved

(1) Law Rep. 7 H. L. 135.
(2) Ibid. 155.
(3) 45 L. J. (Ch.) 43; 46 L. J. (Ch.) 48.
(4) 29 Beav. 91.
(5) 3 My. & K. 699.

against him, and even if he had notice, his mortgagors had no notice, and a purchaser for value without notice can give a good title even to a person who has notice. *Padgett* could not be bound to inquire whether the consideration which appears by the conveyance to *Holroyd* to have been given by him was in fact paid.

As to *Jane Hartley Carr*, she is entitled to redeem the mortgages subject to which she purchased, and to place herself in the position of the mortgagors, and, therefore, even if she had constructive notice of the Plaintiffs' lien, her equity is not a rival equity to theirs, but a distinct and a higher equity, and does not depend merely on its date.

Waller, Q.C., and *Bunting*, for the executors of *Roberts*:—

There is no sufficient evidence of constructive notice to *Roberts*. And, if *Holroyd* had notice, there is no evidence of notice to him in connection with the conveyance to *Roberts*. That is essential.

[FRY, J.:—*Holroyd* was a volunteer.]

Rice v. *Rice* (1) shews that an equitable mortgagee by deposit from a purchaser has a better equity than the unpaid vendor in respect of his lien for purchase-money.

[FRY, J.:—In that case the vendor had parted with the conveyance to the purchaser; in the present case the vendors retained the deed.]

But they registered it. Looking at all the circumstances our equity is better than that of the Plaintiffs. There was no reason why *Roberts* should inquire for the title deeds; they would in the natural course of things be in the possession of the mortgagee.

Again, how can the Plaintiffs assert any lien as against us, when without our consent they have released their lien as against the purchasers of other lots? That act operates as a release to us.

[FRY, J.:—The releases were executed before your right arose. And must it not be shewn that when the Plaintiffs gave the release, they knew that there were other sub-purchasers?]

(1) 2 Drew. 73.

FRY, J.
1882
KETTLEWELL v. WATSON.

Byrne, for the Defendants *William Watson* and *Diana Watson*:—

All that is proved against us is that *Asling* was employed to prepare the conveyances to us. That is not an employment of him as our solicitor. And there is no evidence that we employed *Richardson & Watson* as our agents.

Under the circumstances we were not guilty of any negligence in not inquiring for the conveyance to *Richardson & Watson*. On the abstract of title it appeared that the whole of the consideration had been paid to the Plaintiffs, and that the deed was registered. That was the representation made to us by *Richardson & Watson*; they were committing a fraud on us if there was a lien for unpaid purchase-money, and they were not at liberty to sell free from it. Therefore, the doctrine of imputed notice would not apply: *Cave* v. *Cave* (1). If a purchase-deed can be registered when the vendor intends to retain his lien for unpaid purchase-money, it will lead to gigantic frauds. The Plaintiffs, if they intended that *Richardson & Watson* should be able to deal with the estate, should have taken care to have some written agreement evidencing their lien which could have been registered. A letter would have been enough. *Lee* v. *Clutton* (2) is in our favour.

J. Pearson, Q.C., and *C. B. McLaren*, for the *Midland Banking Company*:—

The Court will not enforce a vendor's lien contrary to the intention of the parties. If it was intended to exist it should have been evidenced by some writing, and a memorial of the writing should have been registered. *Sumpter* v. *Cooper* (3) is distinguishable from the present case. There the claimant against the unregistered assignment was the assignee in bankruptcy of the assignor, and he could not be in a better position than the assignor himself. In *Credland* v. *Potter* (4) it was held that an unregistered further charge in favour of a first mortgagee of land in the *West Riding* must be postponed to a subsequent registered charge taken without notice of the former.

[FRY, J.:—There the further charge was in writing.]

(1) 15 Ch. D. 639.
(2) 45 L. J. (Ch.) 43; 46 L. J. (Ch.) 48.
(3) 2 B. & Ad. 223.
(4) Law Rep. 10 Ch. 8.

Here an absolute conveyance was registered.

[FRY, J.:—The memorandum on the register states nothing about the payment of the purchase-money.]

The principle of the decision in *Credland* v. *Potter* (1) applies, otherwise the legal estate might be conveyed and no purchase-money paid, so that the purchaser would be a trustee of the legal estate for the vendor. The Plaintiffs have enabled a fraud to be committed when they had it in their power to prevent it. The object of the Act was that a perfect title should be obtained by registration against all unregistered conveyances, legal or equitable, by way of charge or otherwise, and it applies, not only to a case where there is an instrument in writing, but to a case where there might have been, and ought to have been an instrument in writing. If the land had not been in a register county, and the vendor had allowed the deed to get into the purchaser's possession, he could not have enforced his lien for unpaid purchase-money against a sub-purchaser without notice of it; the registration of the deed, when the land is in a register county, without any notice of the lien on the register, is equivalent to allowing the purchaser to have the deed in a case where there is no register. The Plaintiffs have enabled *Richardson & Watson* to represent themselves as absolute owners of the land free from any lien: *George* v. *Milbanke* (2). At any rate our equity is superior to that of the Plaintiffs: *Rice* v. *Rice* (3). We were not bound to inquire about unregistered charges: *Agra Bank* v. *Barry* (4). And it is not shewn that *Taylor*, who conveyed to us, had any notice of the lien, and he was a purchaser for value.

J. Pearson, Q.C., and *Colt*, for the Defendant *Chippendale*:—

Chippendale only gave authority to *Richardson & Watson* to employ a solicitor to prepare his conveyance; there was no general retainer of a solicitor in the matter, so that, even if the solicitor had notice of the lien, it was not his duty to inform *Chippendale* of it. And, if *Richardson & Watson* were his agents, which we say they were not, they were intentionally committing a fraud:

(1) Law Rep. 10 Ch. 8.
(2) 9 Ves. 190.
(3) 2 Drew. 73.
(4) Law Rep. 7 H. L. 135, 157.

FRY, J. 1882 KETTLEWELL v. WATSON.

Cave v. *Cave* (1). And there was no negligence amounting to fraud on the part of *Chippendale* himself: *Agra Bank* v. *Barry* (2); *Ratcliffe* v. *Barnard* (3).

Also *Chippendale* is protected because he bought from a purchaser for value without notice. At any rate, the Defendants cannot be made liable *in solido* for the whole £1500; each is at the most liable for the purchase-money which he paid for his lot, which is the only sum which the Plaintiffs could have claimed from him if he had known of their lien and had asked them to release it as against them.

Cookson in reply:—

One argument is that we were guilty of fraudulent negligence in not obtaining a written charge.

[FRY, J.:—I do not want to hear you as to that.]

Then it is said that by registering the conveyance to *Richardson & Watson* we armed them with a title which enures to the benefit of the sub-purchasers. *Agra Bank* v. *Barry* does not lay down that the register is a protection to a person who does not search it. Here the Defendants, or most of them, do not even allege that they searched the register. Therefore, they are not in any better position than if the land was not in a register county.

[FRY, J.:—The Lords seem to have thought in *Agra Bank* v. *Barry* that a register absolves a purchaser from inquiring about deeds so fully as he would be bound to inquire if there was no register.]

The decision does not apply if the register is not searched at all. And it proceeded upon the *Irish Registration Act*, which is different from the *West Riding Act*.

If any of the Defendants employed no agent or solicitor when they were making their purchases then they wilfully abstained from investigating the title or making any inquiries about the deeds. Wilful abstention from inquiry about incumbrances is fraud in the eye of the Court, and a man who knows nothing about the law is in no better position than a lawyer. Gross negligence

(1) 15 Ch. D. 639. (2) Law Rep. 7 H. L. 135.
(3) Law Rep. 6 Ch. 652.

amounts to fraud, though there may be no moral fraud: *Worthington* v. *Morgan* (1).

The release of the lien as against some of the sub-purchasers does not affect the Plaintiffs' rights against the others.

Smith v. *Evans* (2) does not apply. *Lee* v. *Clutton* (3) decides nothing more than *Agra Bank* v. *Barry* (4).

As to the Defendant *Padgett*, it is true that a purchaser for value without notice can pass on a good title to any one; but *Holroyd* was a mere dummy. He gave no consideration. But it must be a *bonâ fide* purchaser: *Sugden's* Vendors and Purchasers (5). And if *A.* buys with notice of an incumbrance, and then sells to *B.* who has no notice, and *B.* sells to *C.* who has notice, the notice to *A.* is revived, and *C.* is liable to the incumbrance.

It is clear that the Defendant *Jane Hartley Carr* and those who are in the same position as she is, have only equities of the same nature as the equity of the Plaintiffs, and that of the Plaintiffs, being prior in date, must prevail.

As to the *Midland Banking Company*, they have not pleaded, nor have they proved, that the purchasers through whom they claim were purchasers for value without notice. The *onus* of proof is on them.

FRY, J.:—

Whatever may be the ultimate decision in this case, it is impossible to have listened to it without great pain, because it exhibits in a very forcible manner the dangers to which purchasers of small plots of land are exposed.

In this case a piece of land of about four acres has been subdivided into numerous parcels, which have been purchased, for small sums of money, by various persons, many of whom are now before the Court as litigants in this very expensive and elaborate litigation. Such purchasers are exposed to this difficulty, that they must either expend a large sum of money in investigating the title, according to the regular forms of conveyancing, or they

(1) 16 Sim. 547.
(2) 28 Beav. 59.
(3) 45 L. J. (Ch.) 43; 46 L. J. (Ch.) 48.
(4) Law Rep. 7 H. L. 135.
(5) 13th Ed. p. 620.

FRY, J.
1882
KETTLEWELL v. WATSON.

must run the risk (which they might even not escape by that investigation) of finding themselves involved in a very heavy litigation. I cannot help making this observation having regard to the nature of the present case, but, of course, it does not in any way assist the determination of the numerous questions which have been argued before me. [His Lordship stated the facts, and continued:—]

The vendors, in my judgment, had a lien for the £1500, which was protected by the retention of the deed by Mr. *Dibb* their solicitor. It has been strenuously argued before me that they have lost that lien, and numerous are the arguments which have been adduced to support that contention.

In the first place, it is said that they have lost it, or are not entitled to enforce it, by reason of the *Registration Act* which applies to the West Riding of *Yorkshire*, in which this estate is situated. That Act, as we all know, requires the registration of every deed and will relating to land within the West Riding, and it declares that an unregistered deed shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration. It has been said that, whenever land is in a register county, and whenever a vendor could evidence his lien or equitable mortgage by writing, he is bound so to do, and that, if he does not do so, he loses his lien or equitable mortgage as against every person who puts his deed on the register. I cannot come to any such conclusion. The Act is plain. It does not apply to those interests in land which, as I think very unfortunately, Courts of Equity have allowed to be created without writing. It applies in terms only to deeds and wills. It has been held, by parity of reasoning, to apply to writings, but more than fifty years ago it was determined in the case of *Sumpter* v. *Cooper* (1) that it did not apply to an equitable mortgage created by deposit only. That case has, I believe, governed a great number of very large transactions, and, so far as my knowledge and belief go, it has always been considered to be the law, and I find that in a text-book so much used as Mr. *Dart's* book on Vendors and Purchasers the law is laid down as perfectly plain on the authority of that case. I cannot, therefore, shake what I believe to be the

(1) 2 B. & Ad. 223.

established law by any view of my own as to what may be expedient.

Then it was contended that an agreement was entered into between the parties which extinguished the lien. It is enough for me to say that there is no evidence of such an agreement. It might be added that, even if the agreement were proved, the Defendants would be in no better position than they are, because that agreement for a deposit would take exactly the same place as the equitable lien.

Then it is said that, by the course of dealing of the Plaintiffs, and what has been called their lying by, they have lost their right to enforce this lien. It appears that Mr. *Denison*, one of the Plaintiffs, frequently passed one end of the land, and he may have seen that building was going on upon it. It does not, however, appear that he knew whether the buildings were on this particular piece of land or on the neighbouring land, and there is really nothing whatever to shew that the vendors knew that persons were building on this land, and still less to shew that they knew that persons were building on the land on the faith of the vendors' lien not being enforced. Of course it might be that these persons had taken an indemnity against the payment of the vendors' lien.

It is further said that the execution and registration of the conveyance to *Richardson & Watson* either put an end to the vendors' lien or require that it should be postponed. The execution of the conveyance, with a receipt for the whole purchase-money indorsed on it, would, if the deed had been given up to the purchasers so as to enable them to shew a clear title, have been a most material and conclusive circumstance in favour of postponing the lien. But the deed was not given up; it was retained by the vendors, and no person could see the receipt, or the acknowledgment contained in the body of the deed, without going to the office of Mr. *Dibb*, who was the solicitor of the vendors, not of the purchasers, and the fact that it was in his custody must have put any one who asked for the deed on inquiry, to say the least. The registration of the deed is not notice to all the world of the receipt of the purchase-money, because the memorandum registered does not state the receipt for the purchase-money, and therefore it appears to me that it cannot interfere with the right of the vendors to

FRY, J.
1882
KETTLEWELL v. WATSON.

the lien which was created by the mere fact of the non-payment of the money.

Upon the whole I have no hesitation in coming to the conclusion that the Plaintiffs have not in any way lost their lien by any of the circumstances which have been relied upon.

In this case it is asserted that the registered conveyances of the Defendants give them a good title as against the vendor's lien, which is not registered. It is not a contest between two instruments both capable of registration. That must be borne in mind throughout the whole case. The case really turns on the subtle and difficult doctrine of constructive notice. Of actual notice there is now no suggestion.

The constructive notice which is alleged is of two kinds. There is the notice through an agent, which Lord *Chelmsford* has called imputed notice. That is one kind of notice which has been relied on. The other is that which Lord *Chelmsford* thought would more properly be called constructive notice—I mean that kind of notice which the Courts have inferred against a person from his wilfully abstaining from making inquiry or inspecting documents. In the present case I have to apply the doctrine of constructive notice to a great number of transactions, under somewhat varying circumstances, and it appears to me, therefore, desirable to state what I conceive to be the principle of law applicable to constructive notice. The ground upon which the Courts have relieved against registered conveyances, or even against a prior legal title, seems to me to be fraud. The Court will not allow a man to avail himself of a legal estate which he has recovered, or of the right which he may have under a registered conveyance, when he, at the time he took the legal estate, or at the time of the registration of the conveyance, knew a fact which made it unconscionable for him to take the legal estate or to effect the registration. That unconscionable act requires, of course, the coincidence in the same person of the knowledge and of the act, because, if *A.* knows a thing, and *B.* does something inconsistent with *A.*'s knowledge, there is nothing fraudulent in the act; but, if *A.* knows something which renders it unconscionable for him to do the act, and he does it, then there is fraud. The fraud may be in an agent, he both knowing the fact and doing the act, in which case it may be

unlawful for the principal to avail himself of the fraudulent act of his agent; or the fraud may be in the principal himself. The first question then which arises is, did the principal know of the charge? If he did not, had he an agent who knew of the charge? Then the next question is, was it the agent's duty to communicate that fact to the principal? If it was, the Court always holds that he did communicate it, not because, in many cases, he did in fact communicate it, but because, as I understand it, it would be too dangerous to inquire whether the communication was really made; it would open the door to perjury. Having found then that the agent both knew the fact and communicated it to his principal, the next step is to inquire whether the principal did an act which was unconscientious, having regard to the knowledge which the Court so imputes to him? That these are the principles on which the Court has proceeded appears to me plain from the great case of *Le Neve* v. *Le Neve* (1), in which Lord *Hardwicke* so lucidly explained the principles on which he proceeded. He said (2): "Consider, therefore, what is the ground of all this, and particularly of those cases which went on the foundation of notice to the agent. The ground of it is plainly this: that the taking of a legal estate after notice of a prior right makes a person a *malâ fide* purchaser; and not, that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud, and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate." Then, after referring to the definition of *dolus malus* in the civil law, he says: "Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another, *machinatur ad circumveniendum.*" Then he says (3): "Fraud or *mala fides*, therefore, is the true ground on which the Court is governed in the cases of notice, and it is a consequence of the decision of the former question that notice to the agent is sufficient; for, if the ground is the fraud or *mala fides* of the party, then it is all one whether by the party himself or his agent; still it is a *machinatio ad circumveniendum.*" The Court, therefore, receives evidence of

(1) Amb. 436. (2) Amb. 446.
(3) Amb. 447.

FRY, J.
1882
KETTLEWELL
v.
WATSON.

the agency, and it receives evidence of the act of the principal, but it will not receive evidence whether the agent recollected the fact at the time or whether he communicated it to his principal. It deals with those matters by way of irrebuttable presumption when the circumstances are known.

The kind of notice I have endeavoured to describe is that which Lord *Chelmsford* called imputed notice. What is the principle which applies to the other kind of notice with which I am concerned in this case? I mean the notice said to be derived from the wilful shutting of the eyes to documents or to facts. That appears to me to rest really on the same principle, viz., that, if you see a man behaving in a way which shews that he desires to avoid knowing something, or having the knowledge of it brought home to him, then you conclude that he knew enough to make him desire not to have evidence of knowledge against him, and, therefore, it has been said that there may be negligence which amounts to fraud. That language has always seemed to me not strictly accurate. What a man does through negligence he does not do from a fraudulent motive. Fraud imports design and purpose; negligence imports that you are acting carelessly and without that design. But what is meant is this—that conduct which might be negligent, or which might be attributable to negligence, is really attributable to a design not to know any more, and is, therefore, an indication that you knew that of which you desired to avoid the evidence. I am perfectly aware that various Judges have expressed this principle in various ways, and that it is impossible to reduce to exact uniformity the principles which they have laid down, but it appears to me that the more recent authorities have gone back again to the true principle on which all these cases have proceeded. Thus in *Ratcliffe* v. *Barnard* (1), Lord Justice *James* referred to negligence of this sort as "wilful negligence which leads the Court to conclude that the person is an accomplice in the fraud." And in *Agra Bank* v. *Barry* (2) Lord *Selborne*, in addressing the House of Lords, said (3) that the negligence or omission to inquire after title deeds "may be evidence, if it is not explained, of a design inconsistent with *bonâ fide* dealing,

(1) Law Rep. 6 Ch. 652, 654. (2) Law Rep. 7 H. L. 135.
(3) Law Rep. 7 H. L. 157.

to avoid knowledge of the true state of the title." In other words, what you require is, evidence shewing a desire or fixed purpose to avoid knowing more.

There is another principle which undoubtedly is well established, and is an exception from the doctrine of imputed notice, that which is familiarly known by reference to the case of *Kennedy* v. *Green* (1). There it was held that the presumption, which arises from the duty of the agent to communicate what he knows to his principal, may be repelled by shewing that, whilst he was acting as agent, he was also acting in another character, viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character. That I understand to be the principle of that class of cases.

Lastly, it appears to me plain that a *bonâ fide* purchaser for value without notice may deal as he will with the estate which he has acquired, that he has a right to have the whole world as purchasers from him, and that he has a right, therefore, to convey, even to a person cognizant of the infirmity of his title, any legal or equitable interest which he has acquired, and that any person who has acquired any legal or equitable interest under such a purchaser is able to resist the claim of the Plaintiffs.

I must now endeavour to apply these principles to the circumstances of each particular set of Defendants, the circumstances in each case being different.

The first Defendant is *William Watson*. He purchased a small lot, which was conveyed to him by a deed of the 16th of January, 1873. He employed *Richardson & Watson* more or less as his agents. His own evidence was of a vague and general description, and, if it had stood alone, would, I think, have imported the employment of those persons as his general agents in the matter. But, when I refer to the letters which passed at the time, as well as to the statements made by him in his answer to interrogatories, I have come to the conclusion that his employment of *Richardson & Watson* was only to prepare the conveyance to him,

(1) 3 My. & K. 699.

FRY, J. 1882 KETTLEWELL v. WATSON.

and that they were not general agents as was the case in *Brotherton* v. *Hatt* (1). *Richardson & Watson*, therefore, were not under any obligation from that mere agency to disclose the vendor's lien to *William Watson*.

It is then said that *Asling* was employed as solicitor, and that he knew of the Plaintiff's lien. The only evidence given of his knowledge is a letter of his dated the 10th of January, I think, which appears to me ambiguous. It does not conclusively shew that *Asling* was aware that any claim was made in respect of the lien; and it is consistent with his entertaining the idea that no lien was claimed, although he may have thought it might have been claimed. Therefore I cannot fix *William Watson* with imputed notice.

Then the next question is, was *William Watson's* own conduct such as to be evidence of fraud on the ground of his negligence? He and his father bought a small plot of land, for which they jointly paid the sum of £42. *Richardson & Watson*, from whom they bought, were persons of good position at that time as land agents in the town of *Leeds*. Their purchase had been made from the charity trustees, who had held this land for a long number of years. The costs of an investigation of the title would have been so onerous, as, no doubt, to have made the purchase impossible. I ask whether, under these circumstances, I can consider that *William Watson* shut his eyes with the view of not receiving notice of any prior charge? I cannot come to such a conclusion. As Lord *Selborne* said in *Agra Bank* v. *Barry* (2), the whole of the circumstances of each particular case must be attended to, and, looking at all the circumstances of this case, I cannot infer that *William Watson* had any fraudulent design, and I therefore dismiss the action as against him, and of course I dismiss it with costs.

With regard to *Diana Watson*, the representative of *Timothy Watson*, the same observations apply. I am not able to find any substantial difference between the two cases, and consequently I dismiss the action with costs against *Diana Watson*.

Eliza Ainley is the next Defendant. She is a mortgagee of *William Watson* and also of *Timothy Watson*, and, as I have

(1) 2 Vern. 574. (2) Law Rep. 7 H. L. 135.

determined that they acquired the legal estate for value without notice, it follows that they could give a good title to her. Consequently, she is entitled to have the action dismissed against her, with costs.

The next Defendant is *James Padgett*. He is a mortgagee of two plots which were bought from *Richardson & Watson* by *Holroyd*, who was a clerk in their office. It has not been shewn that he had in fact any notice of the Plaintiffs' lien, but it has been shewn that he was a volunteer, and that he was not therefore a purchaser for value without notice.

The next inquiry is, whether *James Padgett* had or had not notice of the Plaintiffs' lien, and that question in his case turns upon his own statement in his answer to the Plaintiffs' interrogatories as to his employment of *Richardson & Watson*. His statement, I am bound to say, appears to me to amount to a general employment of *Richardson & Watson* to do all that they ought to do to protect him. I am unable to say that it is a mere employment to draw a particular conveyance. It seems to me it is not distinguishable from the employment of the scriveners in *Brotherton* v. *Hatt* (1), where it was held that they were not merely persons employed to prepare the conveyance, but were in the position of general agents. I think this was a general agency in respect of the matter in hand, which made it the duty of *Richardson & Watson* to communicate the lien to *Padgett*, and they must be taken to have communicated it to him. The consequence is that, in respect of this mortgage, *James Padgett* is a purchaser with notice, and, as he did not buy from a purchaser for value without notice, he is affected with notice of the lien.

With regard to *James Padgett* as a mortgagee of *Gallon*, the circumstances are the same, with this difference, that whereas in *Holroyd's* case it was proved by the Plaintiffs that he was a volunteer, it has not been proved whether *Gallon* paid the purchase-money or not. The conveyance to him has been produced, and it contains the usual statement that the purchase-money has been paid and the usual receipt for the purchase-money is indorsed on it. The Plaintiffs have alleged in their pleadings that *Gallon* had notice of their lien. They have not

(1) 2 Vern. 574.

FRY, J.
1882
KETTLEWELL
v.
WATSON.

proved it, but they say that the burden of proving that *Gallon* had no notice rests with *Padgett*. It is not, in my judgment, necessary in the present case to determine whether that would be so under ordinary circumstances. In the present instance, the Plaintiffs have taken upon themselves the burden of proving that allegation. They have made it part of their case, and in the corresponding case of *Holroyd* they have made it part of their evidence, and I am bound to say I think it would be unfair to expect the Defendants to support the burden of proof when the Plaintiffs, both by allegation and evidence, have taken the burden of proof upon themselves under exactly similar circumstances. In the present case, therefore, I hold that, the Plaintiffs not having shewn that *Gallon* was a volunteer, and a deed having been produced which states that he paid his purchase-money, they have not established a case against *Padgett* in respect of his mortgage from *Gallon*. In respect of that mortgage he is indeed a purchaser with notice, but he purchased from a *bonâ fide* purchaser for value without notice. Therefore the action must be dismissed against him with costs, so far as it relates to that mortgage.

I now come to the case of *Jane Hartley Carr*. She claims under two titles. She took in April, 1874, a conveyance of the equity of redemption in two plots from *Holroyd*, subject to the mortgage to *Padgett* to which I have just referred. She also took a conveyance from *Hatherley* of the equity of redemption of a plot which was in mortgage to *Alfred Law* and others. The first inquiry is, Had *Jane Hartley Carr* notice of the lien? She is in exactly the same position as *Padgett* with regard to that. She states, as he does, that she left the matter in the hands of *Richardson & Watson*, and, in my judgment, they were bound to communicate to her the existence of the lien, and they must be taken to have communicated it to her. She is therefore a purchaser with notice. She cannot protect herself by *Holroyd's* conveyance, because he is shewn to have been a volunteer, and, therefore, not a *bonâ fide* purchaser for value without notice.

With regard to her purchase from *Hatherley* the matter stands in this way. He is in exactly the same position as *Gallon*, and I hold that, considering the course the Plaintiffs have pursued, the burden of proving that *Hatherley* was a volunteer has been

assumed by them and not discharged. So far, therefore, as the Plaintiffs seek relief against *Jane Hartley Carr* in respect of the equity of redemption which she bought from *Hatherley*, I dismiss the action with costs.

The next group of Defendants consists of *Elizabeth Eastwood*, *Lewis Alexander Shepherd*, and *Charles Henry Marriott*, who are the devisees of *William Eastwood*. He was a mortgagee from *Holroyd* under a deed of the 13th of February, 1874. There is no evidence that *William Eastwood* employed *Richardson & Watson* in any manner, or that he employed *Asling*, or *Bladen*, or any other solicitor, and therefore no notice can be imputed to him. The only question which has been raised is, whether the circumstances are such as to compel me to conclude that he had constructive notice by reason of his own negligence. I really know nothing about the circumstances of his purchase, except the mere fact that it was made, and I cannot therefore say that it is proved to my satisfaction that he ought to be fixed with notice as having been an accomplice in the fraud. I therefore dismiss the action against his devisees, with costs.

I come next to the Defendants *Roberts*, *Wylde*, and *Richardson*, who are the devisees of *Joseph Roberts*. On the 2nd of September, 1874, *Holroyd* conveyed the equity of redemption to him, subject to the mortgage to *William Eastwood* to which I have already referred. Now *Holroyd* was not a purchaser for value without notice, and he conveyed to *Roberts*. *Joseph Roberts*, therefore, in my judgment, took only such equitable interest as *Holroyd* could convey. That appears to me to be the result of the decision in *Phillips* v. *Phillips* (1), which, I may observe in passing, does not apply to the case of a purchase from a *bonâ fide* purchaser for value without notice. *Holroyd* was not a *bonâ fide* purchaser for value without notice. The equity, therefore, which *Joseph Roberts* took from him was merely such as *Holroyd* had, and the only inquiry which remains to be answered is this, Is there anything to displace the priority of the Plaintiffs' equity? With that question I have already to some extent dealt, and it appears to me that there is not. The retention by the Plaintiffs of the conveyance to *Richardson & Watson* makes the case exceedingly different from *Rice* v.

(1) 4 D. F. & J. 208.

FRY, J.
1882
KETTLEWELL v. WATSON.

Rice (1), in which the vendor gave up the deed to the purchaser, and, as I have already observed, the register contains no indication that the purchase-money was not paid. The Plaintiffs, therefore, did not arm *Richardson & Watson* with any instrument by which they could commit a fraud by representing that the vendor's lien for unpaid purchase-money had been satisfied. I see no ground for giving the Defendants' equity priority over that of the Plaintiffs, which is prior in date. I therefore pronounce judgment in favour of the Plaintiffs in respect of the interest of these three Defendants.

The next Defendant is *Jane Ainley*. On the 31st of December, 1874, *Hatherley* mortgaged to her. *Hatherley*, as I have already observed, is not shewn to have been a volunteer. *Jane Ainley* herself had notice, but, taking as she does from a person who, for the reasons which I have already given, I must hold to have been a purchaser for value without notice, I must dismiss the action as against her.

I now come to the case of the *Midland Banking Company*. They hold three securities which, for some purposes, seem to me to stand in different positions. The first two are securities of the 15th of March, 1878, by which *Taylor*, who was an original purchaser from *Richardson & Watson*, created second mortgages in favour of the bank, the first mortgagees having no notice of the Plaintiffs' lien. I will deal with those two securities first. It is not shewn, in my judgment, that *Taylor* had any notice. It does not appear that *Bladen* acted for him, and I cannot come to the conclusion that he had either constructive or actual notice. Therefore, with regard to those two mortgages, the bank claim an equitable interest under a person whom I hold to be a *bonâ fide* purchaser for value without notice, and the Plaintiffs can claim no relief as regards those mortgages. The other security is on a plot the equity of redemption of which had been sold by *Hatherley* to *Taylor*, and *Taylor* mortgaged that equity of redemption to the bank. There, in the same way, it not being shewn that *Hatherley* was not a purchaser for value without notice, I must hold that the bank have acquired a good title under him. The cases differ only in this, that the bank take immediately from the original purchaser in the one case, and derivatively in the other.

(1) 2 Drew. 73.

Lastly, I come to the case of the Defendant *Chippendale*. He took a conveyance in 1877 from *Richardson & Watson*, and he authorized them to employ their solicitor to prepare the deed. Their authority did not go beyond that. It is like the case of *William Watson*, with which I have already dealt. The solicitor himself seems to have conceived that he had only the duty of preparing the conveyance, and it is plain from his evidence that he had no knowledge whatever about the lien. The only inquiry, therefore, is, whether I am bound to hold that there was constructive notice by reason of the negligence of the solicitor. When I look at the fact that the title had been investigated by a large number of solicitors in *Leeds*, that it was a very small purchase, and that the interest of the client was really but small in the matter, I cannot come to the conclusion that Mr. *Malcolm*, the solicitor, shut his eyes for the purpose of committing a fraud.

I believe I have now decided all the cases. With regard to the costs, I can only add the Plaintiffs' costs to their security as against those persons against whom I have given relief. As against the others I dismiss the action with costs.

Bunting:—Does your Lordship think that in a case of this kind where there has been evidence with regard to ten different cases, the whole of the Plaintiffs' costs of the action ought to be charged against the two or three Defendants against whom they succeed? In three cases only out of ten your Lordship has found that the Defendants are liable. Are we to pay the costs of the evidence against the other Defendants which does not affect us? There is only the pleading as regards us, there is no evidence against us. I submit that the Plaintiffs' costs should be limited to those costs which have been incurred as regards the Defendants who are found liable.

FRY, J.:—My impression is that the taxing-master would in a case of this sort consider what part of the evidence was relative to your case.

Bunting:—I thought it required a special direction from your Lordship.

FRY, J.
1882
KETTLEWELL v. WATSON.

FRY, J.:—I think the taxing-master would consider it; at any rate I think he ought to do so.

Bunting:—I understand your Lordship's decision to proceed on one point which you have not touched in your judgment. I think your Lordship has assumed that the Plaintiffs' claim cannot be limited by reason of their having released some of the plots from it, unless it could be proved that their solicitor had notice, when he consented to the release, that the rest of the land had passed into the hands of other persons than *Richardson & Watson*.

FRY, J.:—Yes, I intended to say that. The argument put forward was this, that there had been a release of the Plaintiffs' lien by their giving it up in certain cases. I can conceive that if a person who was entitled to a lien upon properties, which he knew to belong to *A.*, *B.*, *C.*, and *D.*, released the lien to *A.*, he could not afterwards insist upon it as against *B.*, *C.*, and *D.*, because he would, without their privity and consent, be increasing the burden on them. But it appears to me that, in order to raise such an equity, you must shew that he knew that the estate, which had originally been in one person, had got into the hands of various persons. No such evidence has been adduced in the present case.

Feb. 1. The case was on this day, by the direction of the Court, again placed in the paper, when

FRY, J., said:—

After I left the Court the day before yesterday it occurred to me that there was one point in the argument to which I had not sufficiently referred in my judgment. I mean the argument that the doctrine of *Kennedy* v. *Green* (1) applied, and that *Richardson & Watson* were parties to such a scheme of fraud as to repel the presumption of their communicating the Plaintiffs' lien to those persons who employed them. It was pressed upon me that there was a course of dealing by them which led to the suppression of their knowledge of the lien, that they persuaded the various purchasers to employ their solicitors, and that they themselves

(1) 3 My. & K. 699.

executed conveyances containing a covenant that the land was free from incumbrances.

With regard to the last point it must be borne in mind that *Richardson & Watson* were not solicitors, and, although it was highly improper for them to enter into such a covenant while the lien existed, yet it was not fraudulent if they at the same time communicated the existence of the lien to the purchasers. And that is the very point under inquiry.

With regard to the argument that they had a scheme for preventing the disclosure of the lien, I cannot come to that conclusion for this reason, that, although in many cases the purchasers employed them as their general agents, in other cases the purchasers did not, and *Richardson & Watson* appear to have made no objection to the employment of independent solicitors whenever the purchasers wished it. In several cases the independent solicitors obtained knowledge of the lien, and *Richardson & Watson* had no difficulty in making arrangements with the Plaintiffs by which the lien was in effect released. That being so, I cannot conclude that *Richardson* and *Watson* were engaged in a scheme of fraud, and, therefore, in my opinion the doctrine of *Kennedy* v. *Green* (1) does not apply. I thought it right to refer to the argument on this point, but it does not vary my order.

Solicitors for the Plaintiffs: *Paterson, Snow, & Bloxam*, agents for *Dibb, Atkinson, & Braithwaite, Leeds.*

Solicitors for the Defendants: *Ridsdale, Craddock, & Ridsdale*, agents for *G. Crumbie, York; Layton & Jaques*, agents for *Scholefield & Son, Dewsbury; J. W. Hickin*, agent for *Lodge & Rhodes, Leeds; Ashurst, Morris, & Co.*, agents for *Bond & Barwick, Leeds; Torr, Janeways, & Co.*, agents for *Bulmer & Lawson, Leeds.*

(1) 3 My. & K. 699.

W. L. C.

FRY, J.
1882
March 17.

BROWN *v.* PEARSON.

[1881. B. 2152.]

Admissions—Motion for Judgment—Specific Performance—Rules of Court, 1875, *Order* XL., *r.* 11.

A plaintiff may move for judgment upon admissions in the pleadings at any stage in the trial, and notwithstanding that he has joined issue on the defence and given notice of trial.

THE claim of the Plaintiff was for specific performance of an agreement for purchase of eight houses and a shop and land at *Collins Green, Burton Wood, Manchester,* and he delivered his statement of claim on the 4th of August, 1881.

The Defendant delivered a statement of defence on the 25th of November, 1881, in which he made certain admissions which the Plaintiff considered to be sufficient to entitle him to specific performance, but the Defendant "did not admit that he had accepted the title of the Plaintiff to the property in question, or had waived all objection thereto."

The Plaintiff delivered a reply on the 8th of December, 1881, whereby he joined issue with the Defendant upon his statement of defence, and on the same day he gave notice of trial of the action for the 19th of December, 1881.

On the 13th of March, 1882, the Plaintiff gave notice of a motion for judgment on the admissions of facts in the pleadings, and also (if the Court should think fit) that the Plaintiff might be at liberty to countermand the notice of trial of the action given on the 8th of December, 1881.

Samuel Hall, for the motion:—

Order XL., rule 11, gives power to move upon admissions at any stage of the action.

Dundas Gardiner, for the Defendant:—

It is too late for the Plaintiff to move under Order XL., rule 11, after he has put in a reply and given notice of trial.

FRY, J.:—

This is a motion for judgment under Order XL., rule 11. The course of the pleadings is that the Plaintiff put in a statement of claim and the Defendant put in a statement of defence; the Plaintiff replied, joining issue with the Defendant on his statement of defence.

The Defendant says that by putting in a reply the Plaintiff has precluded himself from making this motion. It is said that joining issue on the defence is inconsistent with relying on admissions, and claiming to be entitled to judgment on the pleadings. I see no such inconsistency. In effect the Plaintiff says, "What you say is false, but nevertheless, in spite of what you have stated, I am entitled to judgment." There is no inconsistency in that.

It is said also that after reply it is too late for the Plaintiff to make this application; but Order XL., rule 11, says that "any party to an action may at any stage thereof apply to the Court for such order as he may upon any admissions of fact in the pleadings be entitled to."

It is true that the rule says that this application "may be made so soon as the right of the party applying to the relief claimed has appeared from the pleadings," but that does not preclude him from applying at a later stage.

The order gives power to move for judgment as soon as his right appears, and it also says he may move at any stage.

[His Lordship then considered the effect of the admissions on the pleadings, and said:—]

The result of the admissions is, that the ordinary decree for specific performance must be made.

Hall asked to withdraw the notice for trial which had been given by the Plaintiff.

FRY, J.:—You may have leave to withdraw the notice.

Solicitors for Plaintiff: *Grundy, Kershaw, Saxon, & Samson.*
Solicitors for Defendant: *Swann & Co.*

C. W. C.

FRY, J.
1882
April 19.

FRASER *v.* COOPER, HALL, & CO.

[1881 F. 1230.]

Practice—Parties—Rules of Court, 1875, *Order* XVI., *r.* 9.

The Plaintiff, a bondholder of a railway company, sued "on behalf of himself and all the bondholders of the company other than the Defendant *B.*," but did not obtain an order under Order XVI., rule 9, that *B.* should be sued as representing all bondholders who dissented from the Plaintiff's claim.

One of the bondholders took out a summons whereby he stated that neither the Plaintiff nor the Defendant *B.* properly represented the interests of himself and certain other bondholders, and applied to be made a defendant:—

Held, that the applicant was entitled to be made a defendant, to represent the bondholders being dissentient from the Plaintiff's view.

THIS was an action by the Plaintiffs, suing on behalf of themselves and all other persons entitled to bonds of the *Quebec Central Railway Company* other than the Defendant *Henry James Barker*, against the said *Henry James Barker* and the *Quebec Central Railway Company* and their agents and bankers, for an injunction to restrain the company from misapplying (as it was alleged they intended to do) a new issue of £556,000 mortgage bonds.

The action was originally against the company alone, but Mr. *Henry James Barker*, one of the holders of the bonds, did not adopt the view taken by the Plaintiffs, and obtained leave to be added as a Defendant.

The applicant *E. M. Turnor*, being another of the holders of the new bonds, took out a summons asking that the writ and statement of claim might be amended by adding himself as a Defendant, and that the action might be carried on as against himself.

He alleged that he was a dissentient from the Plaintiff's action, which was prejudicial to the value of the bonds, and also that *H. J. Barker* did not properly represent his interests, and he filed an affidavit stating that many other bondholders concurred in his view.

Glasse, Q.C., and *Philip B. Abraham*, for the applicant:—

Mr. *Turnor* takes a different view of his rights from that taken either by the Plaintiff or by the Defendant, and he ought to be

made a defendant that he may assert his rights in his own way: *Wilson* v. *Church* (1); *Watson* v. *Cave* (2). Mr. *H. J. Barker* has not been made defendant in a representative character.

J. Pearson, Q.C., and *C. T. Mitchell*, for the Plaintiff:—

We object to increase the costs of the action by making the applicant a defendant; his interests will be sufficiently represented either by the Plaintiff or by the Defendant *Barker*: *Hoole* v. *Great Western Railway Company* (3); *Cramer* v. *Bird* (4). In any case the Plaintiff should be allowed to amend by stating that the Defendant is sued on behalf of the dissentients from his claim, including the applicant.

FRY, J.:—

The Plaintiff affects to sue on behalf of Mr. *Turnor*. Mr. *Turnor* says: "I desire not to be represented by you; I take a different view of what is expedient from that which you take, and I desire therefore to be a defendant in order to appear and defend my own interests." It appears to me that it would be almost a matter of course to make Mr. *Turnor* a defendant were it not for the fact that Mr. *Barker* has already been named as a defendant. It is said, and I believe truly, that Mr. *Barker* was named as a defendant because he dissented from the Plaintiff's view of what was expedient to be done in respect of these bonds. But unfortunately the Plaintiffs have not thought fit to state that Mr. *Barker* dissents from the view taken by the Plaintiffs, or to obtain an order under the 9th rule of Order XVI., enabling Mr. *Barker* to be sued as representing a class of all the dissentient bondholders, including Mr. *Turnor*, as representing, in short, all those who dissent from the Plaintiff's view. I think, therefore, that Mr. *Turnor* has a right to say that he must be added as a defendant; and in doing so I shall bear in mind that he seeks to be added after Mr. *Barker* has been added as a defendant, and that the Court will be able, at the hearing of the cause, to deal with the costs caused by Mr. *Turnor* being added in such a way as the justice of the case may require.

(1) 9 Ch. D. 552.
(2) 17 Ch. D. 19.
(3) Law Rep. 3 Ch. 262.
(4) Law Rep. 6 Eq. 143.

FRY, J.
1882
FRASER
v.
COOPER, HALL, & Co.

It has been undoubtedly suggested that the more correct course would be to allow the Plaintiff to amend by stating that Mr. *Barker* is sued in respect of the dissentients, but I do not feel that I am justified in taking that course, because Mr. *Turnor* has come here on the Plaintiff's own statement in the pleadings, which does not shew that Mr. *Barker* either assents or dissents.

One other observation I desire to make, which is this: It appears from the affidavit filed by Mr. *Turnor* that the persons who dissent from the Plaintiff's view are numerous, and that they, or rather some of them, desire to be represented by Mr. *Turnor*. I therefore propose to make an order, under rule 9, Order XVI., that Mr. *Turnor* appears in respect of all those bondholders who do not desire the injunction which is prayed for to be granted.

Solicitors: *Kite; Linklaters & Co.*

C. W. C.

FRY, J.
1882
April 24, 25, 26, 27; *May* 1, 2, 3, 4, 8, 9, 10, 15, 16, 17, 18, 19.

UNITED TELEPHONE COMPANY *v.* HARRISON, COX-WALKER, & CO.

[1882 U. 40.]

Patent—Novelty—Anticipation—Prior publication—Book in Foreign Language—Validity—Variation between Provisional and Complete Specification—Insufficiency of Provisional Specification—Infringement—Use of Equivalent—Discovery after Date of Patent—Practice—Certificate of Proof of Breaches—Patent Law Amendment Act, 1852 (15 & 16 *Vict. c.* 83), *ss.* 6, 43 (*Revised Ed. Statutes, vol. xi., p.* 476, 485).

An instrument, which was alleged to be an anticipation of an invention, patented in 1876, for improvements in electric telephony and telephonic apparatus, was described in a paper written in German, in a scientific journal, called the "*Zeitschrift*" of the *German-Austrian Telegraph Union*, which was published in *Berlin*, in 1862. The description was illustrated by figures. A copy of the "*Zeitschrift*" was in the library of the Patent Office in *London*, and another copy was in the library of the Institute of Civil Engineers in *London*, where it was accessible to all the members, more than 3000 in number, and to friends introduced by them. It was, however, entered in the catalogue only under the head of "Journals," not under the head of "Telephones," or "Telegraphs." A telegraphic engineer gave evidence that, before the date of the patent, he had seen the description in the "*Zeitschrift*," and that, though he could not read German, yet, from his

knowledge of the technical words used, he was able, with the assistance of the plates, to understand the substance of the invention:—

Held, that there had been a sufficient publication in *England* of the prior invention before the date of the patent.

But *held*, upon the facts, that the prior invention was not an anticipation of the patented invention.

A patent held void on the ground that the nature of part of the invention described in and claimed by the complete specification, had not been sufficiently described in the provisional specification.

In a patent for "improvements in instruments for controlling by sound the transmission of electric currents, and the reproduction of corresponding sounds at a distance," the patentee claimed (1) "In an instrument for transmitting electric impulses by sound a diaphragm or tympan of mica, substantially as set forth; (2) In an instrument for transmitting electric impulses by sound, the combination with a diaphragm or tympan of electric tension regulators substantially as hereinbefore described for varying the resistance in a closed circuit substantially as set forth." The Plaintiffs, the owners of the patent, in the instruments which they manufactured and sold, used a diaphragm or tympan of mica to receive the air vibrations produced by the voice; below this diaphragm and in its centre, but of smaller size than it, was a cork, below the cork was a piece of platina foil of the same size as the cork, and in a cavity or box below the platina was placed the substance which was used as a tension regulator. The platina foil formed one electrode and the bottom of the box the other, the current of electricity passing from one to the other through the tension regulator. The Plaintiffs used for this purpose lampblack, artificially compressed into a button. The Defendants made and sold similar instruments, but they dispensed with the mica diaphragm and the cork, the air vibrations being in their instrument received directly on the platina foil, below which was placed the substance used as a tension regulator. The Defendants employed loose particles of coke for this purpose. At the date of the Plaintiffs' patent it was not known that the instrument would work without the independent mica diaphragm; this was a subsequent discovery. The Defendants adduced evidence to shew that their instrument would work equally well if the platina foil above the tension regulator was removed and the air vibrations were received directly on the particles of coke:—

Held, that in the Defendants' instrument the platina foil acted as a diaphragm or tympan, and that the Defendants had infringed the Plaintiffs' patent.

When, at the trial of an action for the infringement of a patent, the Court is of opinion that there has been an infringement by the Defendant, but holds on a legal ground that the patent is void, it will not give the Plaintiff a certificate, under sect. 43 of the *Patent Law Amendment Act*, 1852, that breaches of the patent by the Defendant have been proved.

THIS action was brought to restrain alleged infringements by the Defendants of two patents for telephones belonging to the Plaintiffs.

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & Co.

The first patent was granted on the 9th of December, 1876, to *William Morgan-Brown*, "for the invention of 'Improvements in Electro-Telephony (transmitting or causing sounds for telegraphing messages) and telephonic apparatus,' a communication from abroad by *Alexander Graham Bell*, of the *University of Boston, United States of America*, Professor of Vocal Physiology."

It is unnecessary for the purpose of the present report to state the effect of the specification.

The second patent was granted on the 30th of July, 1877, to *Thomas A. Edison*, of the *United States of America*, for "improvements in instruments for controlling by sound the transmission of electric currents, and the reproduction of corresponding sounds at a distance."

The specification filed on the 30th of January, 1878, as modified by disclaimers filed on the 10th of February, 1880, and the 13th of June, 1881, stated that "this invention relates to that class of electrical instruments in which sound becomes one of the elements in the transmission of the communication, and a corresponding sound is produced at the receiving station, so that oral communications can be sent by electricity and clearly distinguished at the receiving station . . . . . In my present invention I make use of the vibrations given to a diaphragm or tympan, by speaking into a resonant case, to produce a rise and fall of electrical tension upon the line, with such accuracy that the electric pulsations or waves will represent the atmospheric sound waves produced by articulation, and an electro-magnet at the receiving station will respond to the electric waves in such a manner as to reproduce the articulation by acting upon a resonant plate." After referring to the nature of the resonant box or tube for the voice, the specification proceeded:—"The next feature requiring consideration is the character of the diaphragm in the speaking instrument. Many materials have been employed by me, such as metals, horn, vellum, celluloid, ivory, &c., but almost all of these produce a prolonged or secondary vibration from their own resonant character; hence the articulation is defective, and the sound vibrations blend. After extensive experiments I find that mica is almost entirely free from any resonant action, and hence it will respond with the greatest accuracy to the sound vibrations, and,

being of a laminated character, can be employed of any desired thickness, and when secured at its edges responds with the greatest accuracy to the sound vibrations, and does not require to be strained; furthermore, the changes of temperature and atmospheric conditions have little or no effect upon the mica diaphragm or tympan. I find that it is not practicable to open and close the line circuit in instruments for transmitting the human voice; the circuit to the line must be always closed, and the transmission be produced by a rise and fall of electric tension, resulting from more or less resistance in the line. This resistance may be produced in several ways. I have shewn several which will hereafter be named; but I find the most delicate to be small bunches or tufts or disks of semi-conducting elastic fibre, such as particles of silk, and an intermediate conducting or semi-conducting material; this device I call an electric tension regulator; it is more or less compressed, according to the vibrations of the diaphragm or tympan, and the electric current rises in tension as it is compressed, or lessens as the fibre expands . . . . . The fibre is rendered semi-conductive by being rubbed with plumbago, soft metal, or similar material, or by a deposit of metal upon its surface, or by fine particles of conducting or semi-conducting material mixed with it, that conducting power varying with the density of the tuft or bunch of fibre. . . . . In some instances I make use of the best quality of lampblack retained within a case to form the tension regulator, the circuit passing through the same, and the rise and fall of electric tension resulting from the compression of the same by the movement of the diaphragm.

"I am enabled to record the sounds produced by the human voice or otherwise by causing the movements of the diaphragm to be registered on paper or soft sheet metal, and then the paper may be used in an instrument to reproduce the sound upon a delicate diaphragm by giving to the same a vibration similar to that originally given by the voice."

The specification then described by a reference to figures how this recording process was accomplished, and how it was to be applied to transmitting sounds over a telegraph line. In conclusion the specification stated:—

"I do not claim generally the transmission and reproduction of

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & CO.

sounds by increasing and decreasing the resistance of the circuit, nor do I claim separately any of the parts or arrangements hereinbefore described and illustrated in the accompanying drawings, except as hereinafter mentioned; but I claim as my invention—(1) In an instrument for transmitting electric impulses by sound a diaphragm or tympan of mica, substantially as set forth; (2) In an instrument for transmitting electric impulses by sound, the combination with a diaphragm or tympan of electric tension regulators substantially as hereinbefore described for varying the resistance in a closed circuit substantially as set forth; (3) The method herein specified of recording the undulations of the diaphragm or yielding material, and the reproduction of sound by such material acting upon a diaphragm to communicate to the same vibrations similar to the original ones, substantially as set forth."

This recording instrument became known as the phonograph.

The provisional specification, filed when the patent was granted, stated that the patent was granted to *Edison* "for the invention of improvements in instruments for controlling by sound the transmission of electric currents, and the reproduction of corresponding sounds at a distance," and it contained the following statements:—"The vibrations of the atmosphere which result from the human voice, or from any musical instrument or otherwise, are made to act in increasing or lessening the electric force upon a line by opening or closing the circuit, or increasing or lessening the intimacy of contact between conducting surfaces placed in the circuit at the receiving station; the electric action in one or more electro-magnets causes a vibration in a tympan, or other instrument similar to a drum, and produces a sound, but this sound is greatly augmented by mechanical action. I have discovered that the friction of a point or surface that is in contact with a properly prepared and slowly moving surface is very much increased or lessened by the strength of the electric wave passing at such point of contact, and from this variation in the friction a greater or less vibration is given to the mechanism, or means that produce or develop the sound at the receiving station, thereby rendering clear and distinct the sound received that otherwise would not be audible. To carry out the peculiarities of my

invention under the varying conditions of use, I have devised several modifications of the transmitting, receiving, and intensifying devices employed in this sound telegraph; portions of the apparatus are interchangeably available in transmitting or recording; others are adapted to local use; some are only available in transmitting, and others only for receiving; and some portions of my improvement can be availed of to make a record of the atmospheric sound waves, or of the electric waves or pulsations corresponding thereto or resulting therefrom."

The Plaintiffs were the assignees of both these patents, and in the telephones which they manufactured and sold they used the *Bell* receiver and the *Edison* transmitter. They alleged that the Defendants had infringed both the patents by using in the telephones which they sold, a receiver known as the *Cox-Walker* receiver, and another receiver, known as the *Hickley*, both of which, it was said, were infringements of the *Bell* receiver, and a transmitter known as the *Hunnings*, which, it was said, was an infringement of the *Edison* transmitter. The Plaintiffs claimed an injunction and other consequential relief.

The Defendants denied the alleged infringements; and as regards *Morgan Brown's* patent, they, by their particulars of objections, objected (*inter alia*), that *Brown* was not the true and first inventor or first importer; that the alleged invention was not new at the date of the patent, nor useful; and that the supposed invention, or material parts thereof had been before the date of the patent published in Her Majesty's realm.

The questions argued relating to *Morgan Brown's* patent were mainly questions of fact. The only question calling for a report was whether there had been a sufficient publication in *England* of an instrument, invented by a German named *Reis*, which was alleged by the Defendants to be an anticipation of *Bell's* invention. The publication relied on was in a scientific journal called "*Die Zeitschrift des Deutsch-Oesterreichischen Telegraphen Vereins*, Jahrgang 9, 1862," published at *Berlin* in 1862. In this "*Zeitschrift*" was a paper written in German, by one *Legat*, on the subject of the "Reproduction of Musical Tones by Electro-Magnetism," which contained a description, illustrated by figures, of *Reis'* instrument. This instrument was called "*Reis* No. 2," he having

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & Co.

previously invented another somewhat similar instrument, which was called "*Reis* No. 1," and which, it was admitted, was publicly known in *England* before the date of *Morgan Brown's* patent.

The effect of the evidence as to the "*Zeitschrift*" was this: Mr. *H. S. Eaton*, the assistant-librarian of the Institute of Civil Engineers in *London*, said that the "*Zeitschrift*" of 1862 had been in the library of the Institute for seventeen or eighteen years. The library was accessible to all the members of the Institute. In 1864 there were 1000 members. They gradually increased in number, and in 1882 they amounted to over 4000. The members could introduce friends. In 1876 about 3000 persons were entitled to use the library. The "*Zeitschrift*" was entered in the catalogue only under the head "Journals."

Dr. *Alexander Muirhead*, a telegraphic engineer, said that he saw the "*Zeitschrift*" first in 1876, before the 31st of October, in the Patent Office Library in *London*. He thought he had also seen it in 1875 in the Library of the Institute of Civil Engineers. He said that, though he could not read German, yet, from his knowledge of the technical words employed, he was able, with the assistance of the plates, to understand the substance of the description.

The Defendants took similar objections with regard to *Edison's* patent, but the most material objections were two: (1.) that the inventions described in and by the complete specification included one called the phonograph, which was really distinct from that which was described in the provisional specification, and not included in it, and that the patent was therefore bad; (2.) that the *Hunnings'* transmitter was not an infringement of the *Edison*, because in it the vibrations of sound were not received on any diaphragm or tympan distinct from the platina foil which was in contact with the substance used as a tension regulator, and because, both in the *Edison* and the *Hunnings* transmitters, the platina foil was introduced as an electrode, for the purpose of conducting electricity and not for the purpose of a tympan, and was not a tympan in the sense in which *Edison's* specification used the word, if in any sense.

In *Edison's* transmitter the air vibrations produced by the voice were received by a diaphragm or tympan of mica; below that

and in the centre of it was a cork of a smaller size than the diaphragm; below the cork was a piece of platina foil, of the same size as the cork, and in a cavity or box below the platina was placed the substance which was used as a tension regulator. The substance employed in practice was lampblack compressed into a button. In *Hunnings'* transmitter the mica diaphragm and the cork were omitted, and the air vibrations were received directly on the platina foil, below which was placed the material used as a tension regulator, particles of coke being the substance employed by him.

There was evidence that at the date of *Edison's* patent it was not supposed by anyone that a telephone would work unless the air vibrations were received upon a diaphragm distinct from the material or foil which was in contact with the substance used as a tension regulator; and that the discovery that the separate diaphragm could be dispensed with was made after the date of *Edison's* patent. The Defendants adduced evidence to shew that *Hunnings'* transmitter would work equally well if the platina foil above the coke was dispensed with altogether; if, for instance, two semi-circular electrodes were placed on a flat board separated by a lump of putty, over which were placed the particles of coke. With the same view experiments were tried in Court.

T. Aston, Q.C., *Webster*, Q.C., *Cozens-Hardy*, Q.C., and *Moulton*, for the Plaintiffs.

J. Pearson, Q.C., *Hemming*, Q.C., *T. M. Goodeve*, and *F. L. Muirhead*, for the Defendants:—

Both of *Reis'* inventions are anticipations of *Bell's*, and the *Reis* No. 2, was sufficiently published in this country by means of the "*Zeitschrift.*" It is no valid objection that the description was written in a foreign language. If the publication is sufficient in itself, it is immaterial in what language it is written: *Lang* v. *Gisborne* (1); *Plimpton* v. *Malcolmson* (2); *Plimpton* v. *Spiller* (3). The *dicta* of Lord *Brougham* in *Household Coal and Iron Company* v. *Neilson* (4), and of Lord *Campbell* in *Soames' Patent* (5), are

(1) 31 Beav. 133.
(2) 3 Ch. D. 531.
(3) 6 Ch. D. 412.
(4) 1 Web. Pat. Cas. 673, 718.
(5) 1 Web. Pat. Cas. 726, 733.

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & Co.

not inconsistent with this. Indeed the point did not really arise in *Household Company* v. *Neilson* (1).

As to *Edison's* patent, it is invalid because the invention of the phonograph, which is described in and claimed by the complete specification, is not sufficiently described in the provisional specification. The complete or final specification must agree, in all substance and materiality, with the provisional specification, it must not go beyond it. In the present case, a new invention is really introduced by the final specification. The stat. 15 & 16 Vict. c. 83, s. 6, requires that the provisional specification shall describe the nature of the invention. If this is not done the patent is bad: *Foxwell* v. *Bostock* (2); *Bailey* v. *Roberton* (3); *Stoner* v. *Todd* (4); *In re Newall and Elliot* (5); *Penn* v. *Bibby* (6); *Crossley* v. *Beverley* (7); *Crossley* v. *Potter* (8).

Again, there has been no infringement by us of *Edison's* patent. We do not use the mica tympan or diaphragm, and, if it is said that we use an equivalent, the Plaintiffs are bound to shew that it is something which was known to be an equivalent at the date of the patent: *Unwin* v. *Heath* (9). If, at the date of the patent, the patentee knew that he could do better without the diaphragm, he ought to have told the public so. He has not done this, and it is clear from the evidence that he did not then know, and that no one knew that the independent diaphragm could be dispensed with. This is a subsequent discovery, and the *Hunnings'* transmitter is not an infringement of *Edison's*. If *Edison* had been asked at the date of his patent whether his transmitter would work if the mica tympan were thrown away, he would have said, No, without that tympan you have only half the instrument which I patented, and of course it will not work. And everyone then would have said the same. Moreover, we do not use a diaphragm or tympan, in any proper sense of the words, and certainly not in the combination which is claimed by *Edison*. The principle of the two instruments is essentially different. The

(1) 1 Web. Pat. Cas. 673, 718.
(2) 4 D. J. & S. 298.
(3) 3 App. Cas. 1055.
(4) 4 Ch. D. 58.
(5) 4 C. B. (N.S.) 269.
(6) Law Rep. 2 Ch. 127.
(7) 1 Web. Pat. Cas. 112, 117.
(8) Mac. Pat. Cas. 240.
(9) 5 H. L. C. 505; 2 Web. Pat. Cas. 216.

essence of *Edison's* invention is the use of a special tympan distinct from the platina foil; the essence of *Hunnings'* instrument is the dispensing with the separate tympan. It is of the essence of *Edison* that there should be a close contact between the carbon button and the platina foil; it is of the essence of *Hunnings*, that there should be only a loose contact between the platina foil and the particles of coke. The essence of the one is indirect action between the air vibrations and the substance used as a tension regulator; the essence of the other is direct action.

In fact, the platina foil was intended both by *Edison* and *Hunnings* to act as a conductor, and not as a tympan. It is useful also in *Hunnings'* in preventing the coke from falling out when the instrument is carried about, but *Hunnings'* transmitter works just as well when the foil is removed and conductors placed at the sides of the box, as is proved by our evidence, which was to some extent confirmed by the experiments tried in Court.

Again, the materials used by *Edison* and *Hunnings*, as tension regulators, are different, both mechanically and in their electrical qualities.

Aston, in reply:—

There has been no anticipation of *Bell's* invention, either by his own previous invention, or by either of those of *Reis*.

There was no sufficient publication of *Reis* No. 2 in this country. The question is, whether the publication added to the stock of public knowledge in this country. The essence of the grant of a patent is that it shall not destroy any pre-existing rights. *Lang* v. *Gisborne* (1) is distinguishable. The circumstances of the alleged publication must be looked at. No doubt a publication in the Japanese language would be sufficient if a witness who understood that language came forward and said that he knew of the invention from reading the book. But the evidence in the present case does not go so far. What Lord *Brougham* said in *Household Company* v. *Neilson* (2) is directly in point. If the language in which the book is written is one which is generally known among the class of persons concerned, there may be a sufficient publication; if the language is only exceptionally known, evidence must be

(1) 31 Beav. 133. (2) 1 Web. Pat. Cas. 673, 718.

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & CO.

given of the exceptional knowledge. The rule as laid down by *Jessel*, M.R., in *Plimpton* v. *Malcolmson* (1) is, "can it be considered to have been so communicated to the public as to become part of the common stock of public knowledge?" and this view was adopted by the Court of Appeal in *Plimpton* v. *Spiller* (2). *Hill* v. *Evans* (3) and *Neilson* v. *Betts* (4) are to the same effect. The *onus* is on the person who disputes the patent to prove the prior publication. It should be shewn that the persons who used the library were likely to look at the book.

As to *Edison's* patent, the provisional specification sufficiently discloses the nature of the invention. The complete specification is merely a development of the details, it does not amount to a new invention. There is enough to satisfy the statute, and the patent is not invalid on this ground. The phonograph is fairly included in the provisional specification, though the description may be vague.

Unwin v. *Heath* (5) does not touch the present case. There what the Defendant used was not an exact equivalent for what the Plaintiff had claimed by his patent. In the present case it is so: *Bush* v. *Fox* (6).

FRY, J. :—

In this case the evidence on both sides has been of great extent and interest; the instruments, which are in controversy, are of the highest ingenuity and value; and the questions that demand decision are of considerable perplexity and delicacy.

[His Lordship then dealt with the objections to *Bell's* patent, and referred to the first invention of *Reis*, which he held was not an anticipation of the instrument the subject of *Bell's* patent. His Lordship continued :—]

With regard to the second *Reis*, which is the instrument described in Mr. *Legat's* paper in the "*Zeitschrift*," two questions arise. The first is, Was it so published as to be part of the public knowledge on this subject before the taking out of Mr. *Bell's*

(1) 3 Ch. D. 566.
(2) 6 Ch. D. 430, 434.
(3) 4 D. F. & J. 288, 302.
(4) Law Rep. 5 H. L. 1.
(5) 5 H. L. C. 505; 2 Web. Pat. Cas. 216.
(6) Mac. Pat. Cas. 167.

patent? The only book in which an account of this is said to have been published is the "*Zeitschrift*," to which I have already referred, and which is, of course, in the German language. It contains, however, two plates, the one describing the transmitter and the other the receiver, and I think it would be difficult for a person looking at those plates, and having any knowledge of magnetic or electric science, not to come with tolerable clearness to a conclusion as to what the object of the instrument was. It appears that the book was deposited in the usual manner in the library of the Patent Office, and also in the library of the Institute of Civil Engineers, but in the latter case it was catalogued as a journal, and somewhat strangely, as it appears to me, was not catalogued either under the head of electricity or magnetism, or any kindred subject. But it is to be borne in mind that this paper is to be found, not in some journal of general science, not mixed up with other papers on other subjects, but it is in the journal of a society devoted to telegraphic purposes, the existence of which I should think could hardly be unknown to persons skilled in such matters in this country, and where it seems to me very natural that anybody would search for information, as in fact Dr. *Muirhead* did search for it, and to some extent found it. It is true that the only person who is shewn to have consulted it in this country is Dr. *Muirhead*, who, though unable to read German, was enabled by his knowledge of the technical terms to spell out some information from the paper.

Upon the whole, though not without some doubt, I have come to the conclusion that there is evidence before me upon which I ought to infer that the communication made by *Legat* in that journal must be considered to have been within the knowledge of persons skilled in these matters in this country. It appears to me that that is the fair inference from the facts proved before me. I need not say that in coming to that conclusion I have endeavoured to attend to all the earlier decisions, including the decision of the Court of Appeal in *Plimpton* v. *Spiller* (1), and I think that the conclusion which I have already expressed is consistent with those decisions, though I am bound to admit that different minds might as a matter of fact come to different conclusions on the matter.

(1) 6 Ch. D. 412.

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & Co.

Assuming then that the second *Reis*, as described by *Legat*, was a matter of public knowledge, it remains to consider whether the instrument, as there described, was an anticipation of the receiver as patented by Mr. *Bell*. In my judgment it was not.

[His Lordship then gave his reasons for coming to this conclusion, and continued:—] All the objections made to *Bell's* patent in my opinion fail, and I think therefore that the Plaintiffs are entitled to an injunction to restrain the sale of the two receivers which are alleged to be violations and infringements of that patent.

I now approach the second part of the case, which deals with Mr. *Edison's* patent.

If a portion of a circuit consists of substances the parts of which are capable of being brought nearer to one another by pressure, the effect of the pressure will be that the resistance of the circuit will be diminished and the current will be increased. The most important part of Mr. *Edison's* invention consists in using this principle to produce undulations representing the voice by means of a plate actuated by the voice and causing pressure on a portion of the circuit; and, according to the view of the Plaintiffs' witnesses and of Professor *Dolbear*, it is requisite for the practical success of this plan that there should be used a material of low conductivity. It is further requisite that it should possess, either in itself or in the mechanism by which it is supported, sufficient resiliency to revert to the condition in which it existed before the pressure was exerted. This device was called by Mr. *Edison* a tension regulator.

The principle involved was not new—the law that the current from a given battery varied inversely with the sum of the resistances of the circuit was old and familiar to electricians; and the fact that resistance was capable in certain cases of being diminished by pressure was known, as regards certain materials, though the effect of pressure on the resistance of metals and any other substances was at the date of the patent an obscure subject, and appears to be still far from exhausted.

Wherever a metallic point had constituted part of a circuit, and had been subject to any pressure (inasmuch as all metals have some elasticity), there had been in theory a tension regulator,

because the resistance lessened as the faces of the metal points broadened. Such a tension regulator has, since Mr. *Edison's* invention, been discovered in *Reis's* instrument. Again, in *Clerac's* tube, carbon in some form or other had been subjected to pressure, in order to lessen the resistance to the current, but there the result was produced by screws, and was not varied automatically in proportion to any other force. In Mr. *Bell's* patent of 1876, the production of electrical undulations by alternately increasing and diminishing the resistance of the circuit had been explained, but the mode proposed for use had been the approximation or divergence of electrodes in water, the mode of the action of which was limited to a few minutes by reason of the generation of gas from the electrical decomposition of the water. Another similar invention appears to have been made by Mr. *Gray*, but its precise nature has not been disclosed to me; and nothing has been produced to affect my conclusion that Mr. *Edison* had, by applying a plate, actuated by the human voice, to a substance capable of having its resistance diminished by compression and of recovering it by resiliency, added a novel and brilliant discovery to others associated with his name. Mr. *Edison's* patent bears date the 30th of July, 1877; the specification was filed on the 30th of January in the following year, 1878. Two disclaimers and memoranda of alterations have been filed, one on the 10th of February, 1880, and the other on the 13th of June, 1881, and by those memoranda very great alterations have been made in *Edison's* original claim.

It now becomes necessary to consider the specification of Mr. *Edison*, and the question which is so closely connected with it, as to whether the *Hunnings'* transmitter is an infringement of the specification. On referring to the specification, as amended by the disclaiming notes, it will be found that Mr. *Edison* uses this language: "This invention relates to that class of electrical instruments in which sound becomes one of the elements in the transmission of the communication, and a corresponding sound is produced at the receiving station, so that oral communications can be sent by electricity, and clearly distinguished at the receiving station. Musical tones may also be sent, but my present invention is especially available in transmitting and receiving oral

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & CO.

communications. In transmitting musical tones the respective notes each have a definite period for each vibration, hence there is a response at the receiving end from the notes that vibrate in time with the electric pulsations sent, but in speaking there is little change in the musical tone, but considerable in the modulations and inflections of the voice. In my present invention I make use of the vibrations given to a diaphragm or tympan." I pause there to make this observation, that, in considering this specification, two questions principally require decision; the first is as to the nature of the diaphragm or tympan referred to in the specification; the second is as to the matter of the tension regulator, and what parts necessarily go to make up that tension regulator as substantially described in the specification.

Now, before reading further, I will make this observation—that it appears to me that the words diaphragm or tympan ought to receive their ordinary signification in this specification, unless there be something to shew the contrary. The ordinary signification of the word diaphragm I take to be a mere partition or separation—something, as one witness said, which separates something from something else. It is, perhaps, most often applied to a separation existing in that which but for the separation would be one continuous cavity; but it is not, in my judgment, necessarily confined to that use. A tympanum, or, as the word is used in the specification, tympan, signifies in my judgment, primarily a thing like a drum-head, a thing in which a substance elastic in itself, but not acting as an elastic substance unless strained, is strained over a circumference and acts in the manner of a drumhead. Now it will be observed throughout this specification that what Mr. *Edison* refers to is a diaphragm or tympan. I say that, not forgetting that in some cases he uses the one word and in some cases the other: and, according to the conclusion at which I have arrived, the quality which he required in his diaphragm is plainly expressed in the specification, namely, that it shall vibrate with the voice. It has been urged upon me that a tympan possesses another quality—that of magnifying the vibrations produced by the voice. It is quite true that a tympan does possess that quality, but it is equally true that a diaphragm by no means necessarily possesses that quality; and it appears to me that

using the words interchangeably and describing the quality that they must possess—that of repeating vibrations—it would be wrong to require in everything which is to come within the ambit of this specification a quality not belonging to a diaphragm, and not expressed or referred to in the specification as being essential to its operation.

Having made these observations, I now return to the reading of the specification:—"In my present invention I make use of the vibrations given to a diaphragm or tympan, by speaking into a resonant case, to produce a rise and fall of electrical tension upon the line, with such accuracy that the electric pulsations or waves will represent the atmospheric sound waves produced by articulation, and the electro-magnet at the receiving station will respond to the electric waves in such a manner as to reproduce the articulation by acting upon a resonant plate." There I find that the diaphragm or tympan, whichever it is, is to be something which will vibrate, and which by its vibrations will give rise to the rise and fall of the electric current, and nothing more. Then, referring to the pictures or diagrams, he says: "The resonant tube or box *d* is of a size and shape adapted to being spoken into, the same having an opening at one end or side, and a diaphragm or diaphragms *b*, against which the sound waves from the human voice act, and these and the motion that the diaphragm receives is the means of producing a rise and fall of electric tension on the line by the devices hereafter set forth." Now, there again I find that what he aims at is a diaphragm vibrating with the sound waves, nothing more, which by its pressure on the substance below operates on the electric current. Then he says: "The general features thus described pervade my entire invention." We have therefore arrived at the general statement of his invention. Then he proceeds: "But in developing the same many useful and important modifications and variations have been made, which I will proceed to set forth." Then after making some remarks, which it is not necessary for me to read, and referring to the difficulty he has experienced in producing hissing consonants, and to the form of the box which is intended to get over that difficulty, he says: "The next feature requiring consideration is the character of the diaphragm in the speaking

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & CO.

instrument. Many materials have been employed by me, such as metals, horn, vellum, celluloid, ivory, &c.; but almost all of these produce a prolonged or secondary vibration from their own resonant character; hence the articulation is defective, and the sound vibrations blend. After extensive experiments, I find that mica is almost entirely free from any resonant action, and hence it will respond with the greatest accuracy to the sound vibrations, and being of a laminated character can be employed of any desired thickness, and when secured at its edges responds with the greatest accuracy to the sound vibrations, and does not require to be strained; furthermore the changes of temperature and atmospheric condition have little or no effect upon the mica diaphragm or tympan." I only pause here to observe that it is plain that the mica structure is not, properly speaking, a tympanum, because it is not strained, and that he therefore shews that what he prefers above all others is that which is more properly described as a diaphragm, and not as a tympanum—of course, I do not forget that it has a certain operation as a tympanum; but what I mean is that the mica, not being strained, is not within my conception of a tympanum, as usually described. Then he says: "I find it is not practicable to open and close the line circuit in instruments for transmitting the human voice, the circuit to the line must be always closed, and the transmission be produced by a rise and fall of electric tension, resulting from more or less resistance in the line. This resistance may be produced in several ways." Now we approach his description of the tension regulator. "I have shewn several which will hereafter be named; but I find the most delicate to be small bunches, or tufts, or discs of semi-conducting elastic fibre, such as particles of silk, and an intermediate conducting or semi-conducting material; this device I call an electric tension regulator; it is more or less compressed according to the vibrations of the diaphragm or tympan, and the electric current rises in tension as it is compressed, or lessens as the fibre expands." Then he proceeds to describe more in detail the application of this particular electric tension regulator, and he says: "The fibre is rendered semi-conductive by being rubbed with plumbago, soft metal, or similar material, or by a deposit of metal upon its surface, or by fine particles of conducting or semi-

conducting material mixed with it, that conducting power varying with the density of the tuft or bunch of fibre." That tension regulator, consisting of the silk with the metallic coating or other substance put over it, is the one which is described in greatest detail by Mr. *Edison;* but many other forms of tension regulator are described, and those, it appears to me, may be classified in this way:—I find tension regulators constituted of semi-conductive substances with inherent resiliency, such as the one I have already described; I find others which are to be constituted of a semi-conductive substance with an artificial resiliency, that is, a resiliency gained by a spring or other mechanism by which it is applied. I find others in which the operation proceeds on a different principle; they depend on short circuiting, as it is called; that is to say, on diminishing the distance through which the electric current has to travel; those, again, are of two kinds, there is one the operation of which is a little complicated, operating by a spring, and there is another in which the electrodes are inserted in water —the electrodes by pressure from above approaching other electrodes below, therefore diminishing the water space between the two. Lastly, there is a very complicated arrangement with a rheostat, the short effect of which I conceive to be that a current, which in its nature but for the rheostat would have been intermittent, is converted into a continuous current, the rheostat operating for a sufficient time to prevent the current ever entirely ceasing, and in that way a continuous but undulatory current is produced.

The claim made in respect of these tension regulators is this: "In an instrument for transmitting electric impulses by sound the combination with a diaphragm or tympan of electric tension regulators substantially as hereinbefore described for varying the resistance in a closed circuit, substantially as set forth." I have already expressed my opinion that the words diaphragm or tympan must be taken to be used in their natural sense—that anything which separates the substance below from the air or the substance above would be a diaphragm, that anything which is stretched in the nature of a drumhead would be a tympan—and that both these, according to the description, must be capable of being vibrated by the voice; and that, if they are such, they are

FRY, J. 1882 UNITED TELEPHONE COMPANY v. HARRISON COX-WALKER. & Co.

diaphragms or tympans within the meaning of the words as used in the specification.

There remains to consider what is the meaning of the "tension regulator substantially as hereinbefore described." It appears to me plain that the patentee did not intend, and the specification does not intend, to confine the claim to the particular forms of tension regulator which have been indicated. The description of the first form is the most minute. I find as requisite, first, the quality that with its compression the resistance shall be lessened and the current shall be increased. This is probably a quality present, more or less, in all cases in which the substance through which the current passes is broken into pieces, the resistance lessening as the interfaces increase in aggregate area, and *vice versâ*. Secondly, I find that the substance must, either from its inherent character or from its composition as a whole, be of a semi-conductive character. The material must not be an absolute non-conductor—for that would destroy the current; it should not be a good conductor, for then the interruption would probably bear so small a proportion to the current as not adequately to influence the stream, or create sufficient undulations, in the result. Accordingly, the evidence satisfies me that, though theoretically high conductors could be used as tension regulators, and though such substances have been occasionally used with success, yet practically, and especially with a view to the uniformity of results, semi-conductors are best. It is said that this result is due to the fact that in high conductors the point of fusion is low, so that the pieces get fused together; but, as it appears that all the high conductors are easily fusible, and the semi-conductors are not so, the distinction drawn is sufficient for practical purposes. Thirdly, I find that the material must have such a resiliency as will enable it, on the withdrawal of the pressure, to return to its previous condition, and thus check the current which had been increased by the pressure, and be ready again to yield to pressure and again to recover its old position. The necessity of such a quality I find expressed, not only in the description of the silk in the first form, as an elastic fibre, and in the various contrivances to produce an artificial resiliency, but in the general description of the nature of the instrument, which requires such a recuperative

elasticity if it is to act on more than one single occasion. Accordingly I find that in the various forms of tension regulator indicated in the specification, or brought into practice since, this resiliency is acquired, though acquired in various ways: in some, by the inherent elasticity of the substance, as silk or coke; in some, by the elasticity of the applying substances, as where plumbago points are applied by means of springs; in some, as in the lampblack when in powder, by the presence of elastic gases in the interstices of the mass. I think, therefore, that the true meaning of the claim which I have just read, is the union of a tympan or diaphragm capable of vibrating under the sound waves with an electric tension regulator having the qualities which I have just described, because that appears to me to be an electric tension regulator "substantially as hereinbefore described."

I now approach the question which is very intimately connected with the consideration of the specification—is *Hunnings'* transmitter an infringement of *Edison's* transmitter? In *Edison's* transmitter we find, first, a diaphragm, or tympan, or plate, which receives the sound of the voice; below that there is a cork, placed in the centre, not of the same size as the diaphragm, but of a smaller area; below that comes a piece of platina foil, which is of the same size as the cork, and corresponds with the size of the cavity in which the tension regulating substance is placed, and which is one of the electrodes in the current; below that comes the lampblack, or other substance which is used for the purpose of the tension regulator, and below that comes the bottom of the box, which is itself an electrode, and in which is placed a screw for the purpose of initial regulation. The *Hunnings'* transmitter is different in this way; that it has no cork, and no diaphragm separate from or other than the platina foil; the platina foil in *Hunnings'* receiving directly the human voice. They are of the same character in there being a cavity, or cell, in which the metal bottom is one electrode, and the platina foil at the top the other; but the differences are, I believe, to be fairly stated as follows:— First, the materials in the cell are different; coke has been used by *Hunnings*, lampblack has been preferentially used by *Edison*. Coke is not mentioned with any of the articles used in *Edison's* specification. In the next place, the size of the particles is

FRY, J.
1882
UNITED TELEPHONE COMPANY, v. HARRISON, COX-WALKER, & Co.

different, the particles of lampblack being in fact very much smaller than the particles into which the coke is crushed. In the next place, as I have already pointed out, there is in *Edison's* the superimposition over the platina of a cork and a disc; and lastly, there is the screw at the bottom, which is applied in the *Edison* for the purpose of giving initial pressure. And there is a certain amount of difference in their action. In *Hunnings'*, the up and down motion produced by the voice is communicated through the foil to the particles directly; in *Edison's* the up and down motion of the voice is translated into circular nodal ripples in the disc or tympan; this is retranslated, so to speak, at the centre into an up and down motion which is communicated to the cork, and which the cork communicates to the foil, and the foil to the air. The result appears to me to be that the action in the *Hunnings'* is more accurate, because more direct; but in *Hunnings'* case there is not that magnifying of the operation of the voice that takes place from the presence of the tympan or disc in *Edison's*. The *Hunnings'* transmitter appears to me, therefore, to be an improvement on *Edison's* patent, but it may none the less be an infringement of it, and I have come to the conclusion that, like *Edison's*, it is the combination of a diaphragm vibrated by the voice (that being the platina foil) with a tension regulator consisting of a semi-conductive resilient and compressible substance, and it is therefore within the scope of *Edison's* specification.

It has been argued that *Hunnings'* transmitter acts on a different principle to *Edison's*—that the one demands compression and the other freedom of motion, that in the one the presence of a diaphragm is essential and that in the other it is not; but the evidence—amongst others of Professor *Dolbear*—shews that the presence of the foil is essential or useful in both cases. In both cases it acts as an electrode, in both it gives the required extension in order that an electric current may pass through all parts of the substance which constitutes the tension regulator; in both it keeps the inclosed substances in their places. Before passing from this subject, and considering the meaning of the word "diaphragm," I think it not immaterial to observe that Mr. *Hunnings*, acting with the assistance of the patent agent, whose name he mentioned to us, in describing his own invention, described the top of the

platina foil as a vibrating diaphragm. That is exactly the conclusion which I have drawn, that the platina foil is a vibrating diaphragm; and I have concluded that *Edison* described, as the essential requisite of his invention, the combination of a vibrating diaphragm with a tension regulator.

The discovery which Professor *Hughes* made in 1878, that the vibrations produced by the voice might operate on a heap of particles directly, and without the intervention of any diaphragm or tympan, or any such thing, has, in my opinion, suggested the argument that *Hunnings'* and *Edison's* transmitters operate on different principles; but, not only is it the fact that the *Hunnings'* transmitter is not used without the platina foil, but it has not been shewn to my satisfaction that it can be so used with success; and, according to the evidence of Professor *Sylvanus Thompson*, the same physical principle, namely, that of diminishing the resistance and increasing the current by the increase of contact from pressure, underlies alike the tension regulator of *Edison* and the microphone of *Hughes*.

I now come to consider the two objections which have been made to the validity of *Edison's* patent on the ground of the nature of the claims. The first of these is based upon the first claim, which is in these words: "In an instrument for transmitting electric impulses by sound, a diaphragm or tympan of mica substantially as set forth." Does that mean that he claims the mica diaphragm or tympan in all instruments for transmitting electric impulses by sound? If it did, it appears to me that the claim would be bad; because I think it is really the claim of the application of an old substance to a particular purpose without the use of any ingenuity in that application, without the use of any invention in that application; but, if it means that the mica diaphragm is claimed in the instrument for transmitting electric impulses by sound which is described in the specification, then I think that is not in any way bad; and, upon the whole, I have come to the conclusion that it may be read as relating only to the mica diaphragm in combination with the rest of the instrument. It is to be borne in mind that in construing claims one must construe them, not as enlarging the operation of the description, but rather as disclaiming everything which is not claimed. They are inserted for the

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & Co.

purpose of drawing the line between what the patentee knows to be old and what he desires to claim as new in the invention he has described.

I now come, however, to the last and a very serious objection to the validity of the patent. It is this: Mr. *Edison* discovered an instrument of the highest ingenuity, which is commonly called a phonograph. That instrument is a purely mechanical one; it has nothing whatever to do with electrical or magnetic science; it has nothing necessarily to do with the transmission of sound to a distance; it is, in substance, a diaphragm actuated by the voice, which operates upon a style which impresses itself on an impressible plate. The impression which is made on that plate again actuates a style, which again actuates a diaphragm, which again actuates the air; that which operated on the one diaphragm in the form of the human voice is reproduced by the other diaphragm in the condition of audible sounds. Mr. *Edison* points out in his specification that the voice can thus be produced by the second diaphragm. He also points out that the instrument may be used in another mode, namely, by connecting the second diaphragm with a transmitter, and using that diaphragm as the diaphragm of the transmitting instrument, in which case the second diaphragm does not immediately produce an audible sound, but produces an undulation of the electric current, while at the end of the current the receiver reproduces the audible sound. The description which is given of the instrument is this: "I am enabled to record the sounds produced by the human voice or otherwise, by causing the movements of the diaphragm to be registered on paper or soft sheet metal, and then the paper may be used as an instrument to reproduce the sound upon a delicate diaphragm, by giving to the same a vibration similar to that originally given by the voice." Then he proceeds to describe the figures. It appears to me to be plain that Mr. *Edison* has described a substantive discovery of the very highest interest and ingenuity, by which at one spot this instrument receives and reproduces the human voice. Then he goes on to say, "if these sounds are to be transmitted over a telegraph line the diaphragm 10 is provided with a cork disk and fibrous tension regulator;" and then, as I have already pointed out, the second diaphragm, instead of reproducing the voice at the time,

acts in fact upon the tension regulator. Now what is the claim made by Mr. *Edison* in respect of that apparatus? It is this: "The method herein specified of recording the undulations of the diaphragm or yielding material, and the reproduction of sound by such material acting upon a diaphragm, to communicate to the same vibrations similar to the original ones, substantially as set forth." It is impossible for me to read that claim and not to believe it to be a claim to the instrument, whether used in combination with an electric current or not, its capacity to produce sound without any relation to the electric current having been pointed out and dwelt upon. The mode of indenting was a novelty; the mode of reproducing that sound was a novelty; and the claim appears to me to cover the phonograph in both its applications—its application to reproduce human sound directly and immediately at the spot where the voice had been spoken to it, and its application also as a transmitter of the same voice to a distance.

Has that remarkable discovery, so made by *Edison*, been in any manner described in the provisional specification? The statute, as we all know, requires that the provisional specification shall describe the nature of the invention; and, before I proceed to consider the provisional specification in this case, I think it desirable to refer to some of the authorities which explain the principle upon which I ought to proceed in considering it. In the case of *Bailey* v. *Roberton* (1) Lord *Blackburn* very clearly explains the function of the provisional specification. He says (2): "The patent law, dating from the time of *James*, gave a monopoly to the invention of the first inventor, it therefore gave a monopoly solely to that invention which was his invention; he could not claim an invention greater than the title of the patent, but the titles were of extreme generality. It is in this particular instance 'for improvements in preserving animal substances.' Almost any kind of thing would come under that description; the mere title gave very little instruction. Then, in the time of Queen *Anne*, the Attorney-General of the day invented what was obviously a very great improvement. He made it a condition that the patentee should, within six months, particularly 'describe and ascertain'

(1) 3 App. Cas. 1055. (2) 3 App. Cas. 1074.

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & Co.

the invention and the manner in which it was to be performed; if not, it should be void. If that was done at the end of six months, that specification fixed what was the invention for which the patent was granted. Then, during the six months it would have been, and before specifications were invented it must have been, a question of evidence as to what was the invention for which he went to the Crown, and for which the Crown granted a monopoly, and the traverse of that would be the proof. Then came the statute of 1852, which introduced a further amendment. It enacted that when persons went to apply for letters patent they should deposit a provisional specification. That provisional specification describes the invention in terms very different indeed from those in which the final specification described it. In this case, instead of saying 'it shall particularly describe and ascertain the nature of the invention, and in what manner the same shall be performed,' all that the statute says is that in the provisional specification which the applicant leaves with the law officer of the Crown when he applies for a patent, he shall state the nature of the invention—no more than that; and then, when the law officer of the Crown to whom it is referred has looked at it and finds it does state the nature of the invention, but thinks the nature of the invention as stated is too large or too vague, he may require him to amend it; but if not, then he grants a certificate to use the patent publicly, without at all thereby making a present of the discovery to the public; and when it came to be a question whether or no what he was doing during that six months did avoid the patent, I take it the process must have been to say, 'Look at the nature of the invention described in the provisional specification, and say whether this which you have been doing, and which you say was a part of the patent, is fairly within the nature of the invention you have described; in that case you are protected; but if it is a new and separate invention, and a different one, then you are not protected.' I cannot but think that when that is once looked at, it becomes pretty clear that, when the nature of an invention has been described in the provisional specification in the way which has been mentioned, if something were found out during the six months to make the invention work better, or with respect to the mode in which the operation may be performed, a

thing which is very likely to happen when, in carrying out his invention, the inventor finds that some particular bit will not work so smoothly as he expected, and it is necessary to add a little supplement to it—still the nature of his invention remains the same, and it is no objection that in the complete specification, which comes afterwards, the invention or application is described more particularly and in more detail—or even if it be shewn that there has been more discovery made, and so as to make the invention which he has described in the provisional specification really workable. If nothing more is done than that, I think it is good; but, as soon as it comes to be more than that, and the patentee says, in the provisional specification, 'I describe my invention as A,' and in the complete specification he says, 'I hereby describe A and also B,' then, as far as regards B, it is void, because the letters-patent were granted for the invention that was described in the provisional specification, and do not cover the invention that is described in the other.'" Again, in *In re Newall and Elliot*, the Court of Common Pleas made observations to a similar effect. They said (1), "The office of the provisional specification is only to describe generally and fairly the nature of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out." And similar language is used by *Jessel*, M.R., in *Stoner* v. *Todd* (2), where he said that it might be roughly but it must be fairly done.

Now I turn, with the light thrown by those cases as to the proper mode of construction, to the provisional specification in this case, and find that the title, which is to be read as part of the provisional specification, is, "Controlling by sound the transmission of electric currents, and the reproduction of corresponding sounds at a distance." And the inventor proceeds in this manner; he says: "The vibrations of the atmosphere which result from the human voice, or from any musical instrument, or otherwise, are made to act in increasing or lessening the electric force upon a line by opening or closing the circuit, or increasing or lessening the intimacy of contact between conducting surfaces placed in the circuit at the receiving station; the electric action in one or more electro-magnets causes a vibration in a tympan, or other

(1) 4 C. B. (N.S.) 293. (2) 4 Ch. D. 58.

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & Co.

instrument similar to a drum, and produces a sound, but this sound is greatly augmented by mechanical action. I have discovered that the friction of a point or surface, that is in contact with a properly prepared and slowly moving surface, is very much increased or lessened by the strength of the electric wave passing at such point of contact, and from this variation in the friction a greater or less vibration is given to the mechanism, or means that produce or develop the sound at the receiving station, thereby rendering clear and distinct the sound received that otherwise would not be audible." I pause there, to observe that it is plain that that description refers entirely to the transmission of sound or the controlling of sound by means of electric currents or electricity in some form or other, and cannot, in my judgment, be taken to apply to an instrument which is capable of being worked in a very remarkable manner, without the application of electricity in any shape or form. Then the inventor proceeds in these words—"To carry out the peculiarities of my invention;"—it is obvious, therefore, that the substance of the invention has been disclosed in the preceding paragraph,—"to carry out the peculiarities of my invention under the varying conditions of use, I have devised several modifications of the transmitting, receiving, and intensifying devices employed in this sound telegraph," all evidently referring to sound to be transmitted to a distance, "portions of the apparatus are interchangeably available in transmitting or recording," and, I observe, in passing, the evidence goes to shew that at that time recording, as used in connection with telegraphy, meant some sort of telegraphic representation of the sound, because no other had been known till this invention was made—"Others are adapted to local use; some are only available in transmitting, and others only for receiving; and some portions of my improvement can be availed of to make a record of the atmospheric sound waves, or of the electric waves or pulsations corresponding thereto or resulting therefrom."

Now, no doubt some of those words do explain or might be held to refer to an instrument like the phonograph; but when I ask myself whether they in any manner describe the nature of the invention, I am bound to say that they do not; these, as I have already observed, are merely methods for carrying out the peculi-

arities of the invention; which invention, I repeat, is confined to the transmission of sounds by electrical agency to a distance. Supposing an inventor had, during the six months which preceded the complete specification, invented the phonograph, not as applied to the electric telegraph, but operating by itself, can it be said that that invention would have been protected by the description contained in this provisional specification of that instrument? I agree that the provisional specification need not describe the manner in which an invention is to be carried into effect. I agree that it need not describe the nature of the invention otherwise than roughly; but it ought to do so fairly and honestly; and if Mr. *Edison* was at the time at which these letters patent were granted in possession of that very remarkable mechanical invention by which speech could be reproduced, not necessarily at a distance, but in the same room as that in which it was uttered, I do not think the provisional specification was an honest statement of the nature of that discovery.

On that ground I come to the conclusion that Mr. *Edison's* patent cannot be upheld, and I must therefore grant an injunction in respect of the first patent, and dismiss the action as regards the second.

Then arises the question of costs, and, upon the best consideration which I can give, I think I shall act in mercy to the parties if, instead of apportioning the costs, I grant the injunction without costs. The form of the injunction will be the usual one, as given in *Seton* on Decrees.

The proposal to give no costs being objected to,

FRY, J., said that he would give the parties their strict rights, and dismiss the action with costs as regarded *Edison's* patent, granting an injunction with costs as regarded *Bell's* patent.

Aston asked for a certificate under sect. 43 of the *Patent Law Amendment Act* of 1852, that the Defendants had proved the breaches alleged.

[FRY, J.:—Can I grant a certificate of breaches in a case in which the patent is void?]

The question of infringement has been raised and fought

FRY, J.
1882
UNITED TELEPHONE COMPANY v. HARRISON, COX-WALKER, & Co.

out, and decided. The certificate may be given for what it is worth.

FRY, J.:—I do not give things for what they are worth. It seems to me difficult to certify that there has been an infringement of that which I hold to be no patent. If you can give me a precedent for certifying, I will follow it.

Solicitors for Plaintiffs: *Waterhouse & Winterbotham.*
Solicitors for Defendants: *Davidson & Morriss.*

W. L. C.

FRY, J.
1882
June 9, 10.

In re CLARKE'S TRUSTS.

Married Woman—Bequest to Separate Use—Restraint on Anticipation—Payment on Separate Receipt—Income-bearing Fund—Personal Estate—Conversion.

A testator bequeathed an annuity to his wife. And he directed his trustees and executors to provide for the same, either by setting apart a sufficient portion of the produce of his residuary personal estate, or by purchasing an annuity. And, after bequeathing some pecuniary legacies, he devised and bequeathed all his real estate, and the residue of his personal estate, to his two daughters, their heirs, &c., as tenants in common, so that the same might be enjoyed by them, during any and every coverture, as separate property free from marital control, and without power of anticipation. The executors paid the testator's debts, funeral and testamentary expenses, and legacies, and purchased an annuity for the widow. The residue of the estate then consisted of two sums of stock and a sum of cash. One of the daughters was married:—

Held, that the will did not require the conversion of the residue into money, except so far as might be necessary to provide for the annuity:

Held, also, that the married daughter's share of the stocks, they being income-bearing funds, could not be transferred to her, but that only the income arising from them could be paid to her:

But, *held*, that her share of the cash might be paid to her on her separate receipt.

In re Ellis' Trusts (1) followed.

In re Croughton's Trusts (2) distinguished.

PETITION.

W. P. Clarke by his will, dated the 30th of July, 1875, bequeathed to his wife, *Ann Clarke*, an annuity of £40, and he

(1) Law Rep. 17 Eq. 409. (2) 8 Ch. D. 460.

directed his trustees and executors to provide for the same, either by setting apart a sufficient portion of the produce of his residuary personal estate for that purpose, or by purchasing an annuity of the like amount from Government or from some respectable life assurance or annuity company. And the testator bequeathed to his brother £100, and directed his executors thereinafter named to sell and dispose of all his furniture and other moveable chattels, and to divide the net proceeds of sale equally amongst his wife and his daughters *Eliza Hall* and *Mary Clarke*. And he also bequeathed to his wife the sum of £200, and he devised and bequeathed all his real estate (if any) and the residue of his personal estate unto his said two daughters, their heirs, executors, and administrators, as tenants in common, so that the same might be enjoyed by his said two daughters during any and every coverture as separate property free from marital control, and without power of anticipation. And the testator appointed his brother and two other persons trustees and executors of his will. The testator died on the 25th of October, 1880. The executors paid the testator's funeral and testamentary expenses, and his debts and legacies, and they purchased an annuity of £40 a year from the *Hand in Hand Life Assurance Society*, to meet the annuity bequeathed to the widow. The residue of the testator's personal estate then consisted of a sum of £1034 10*s.* consols, a sum of £800 *Madras Railway* stock, and a sum of £53 18*s.* 9*d.* cash. In May, 1882, the trustees sold a moiety of the *Madras Railway* stock, and they transferred into Court a moiety of the Consols, and after paying the expenses of that transfer, they paid into Court a moiety of the residue of the cash and of the proceeds of the sale of the moiety of the *Madras Railway* stock.

Eliza Hall, one of the testator's daughters, who was a married woman living apart from her husband, presented a petition, by a next friend, asking that the consols and cash in Court might (subject to the payment of costs) be transferred and paid to her on her separate receipt, and as part of her separate estate. No settlement had been made on the Petitioner's marriage or subsequently thereto, and her husband was willing that the payment and transfer asked for should be made to her.

FRY, J.
1882
In re CLARKE'S TRUSTS.

Warmington, for the Petitioner :—

The question is whether the case is governed by *In re Croughton's Trusts* (1) or by *In re Ellis' Trusts* (2). In the former case it was held that, the gift being of a fund which was not producing income, the fund might, notwithstanding the restraint on anticipation, be paid out to the legatee, who was a married woman, on her separate receipt. In the latter case a fund producing income was given absolutely to a married woman, and the gift was followed by a restraint on anticipation, and it was held that she could not aliene the fund during coverture. I say that the present case is governed by *In re Croughton's Trusts.*

[FRY, J. :—In *In re Croughton's Trusts*, Vice-Chancellor *Bacon* seems to have held that there was a conversion of the testator's estate. How do you get a conversion here?]

The testator speaks of the "produce" of his residuary personal estate, and that implies that his executors would have the whole estate in their hands in the shape of money.

[FRY, J. :—Would the executors have been justified in selling a valuable chattel if the annuity to the wife had been otherwise provided for?]

They would, unless the residuary legatees had objected. The testator does not direct that part of his personal estate sufficient to provide for the annuity shall be sold; he in effect directs that the whole shall be sold, and then that a sufficient part of the produce shall be set apart to provide for the annuity.

[*In re Benton* (3) was also referred to.]

Wurtzburg, for the trustees.

FRY, J. :—

The question is whether, as to her interest in the testator's residuary estate, the Petitioner is fettered by a restraint on anticipation, or whether she takes it absolutely. It appears to me that it depends on this, was the fund in Court a pure money fund? If it was, the Petitioner is entitled to receive it, and the fetter on

(1) 8 Ch. D. 460. (2) Law Rep. 17 Eq. 409.
(3) 19 Ch. D. 277.

anticipation then necessarily falls. If, on the other hand, the fund was an income-producing fund, she is fettered during her life by the restraint on anticipation. This I take to be the effect of the most recent decisions. The testator's daughters would be entitled to take the estate in the condition in which it was. If it was in the condition of money it would not be an income-bearing fund. If it was in the condition of consols or other stocks it would be an income-bearing fund, and I can see no reason why the principle of the decision in *In re Ellis' Trusts* (1) should not apply. In fact, the testator's residuary personal estate consisted partly of the several sums of stock, and partly of a sum of cash. It appears to me that the principle of *In re Ellis' Trusts* does apply to the sums of stock which were bearing income, but that there is no reason why it should apply to the cash.

It is, however, said that the effect of the will is to direct the conversion of the whole of the testator's personal estate into money, and that, though it was not actually in money, yet, as between the persons entitled to it, it ought to have been money, and that it must be treated as money. It appears to me that the will does not contain a sufficient direction for the conversion of the personal estate. There is only the direction as to the purchase of an annuity for the testator's wife. That direction might be carried into effect without converting the estate at all; at any rate, it might be carried into effect by converting only so much of the personal estate as might be necessary for the purpose. I cannot come to the conclusion that it was the duty of the trustees to convert into money the whole of the personal estate. I hold, therefore, that the Petitioner is entitled to have the cash in Court paid to her, but that, as to the stocks, she is entitled only to receive the income during her life, subject to the restraint on anticipation.

Solicitors for Petitioner: *James, Son, & James,* agents for *Clutterbuck & Trevenen, Carlisle.*

Solicitors for Trustees: *Cookson, Wainewright, & Pennington.*

(1) Law Rep. 17 Eq. 409.

W. L. C.

FRY, J.
1882
June 17.

ATTORNEY-GENERAL *v.* SHREWSBURY (KINGSLAND) BRIDGE COMPANY.

[1879 A. 228.]

Illegal Act—Injury to Public—Right of Attorney-General to sue—Evidence of Injury—Company—Excess of Statutory Powers—Injunction—Costs.

22 Ch D 45

When an illegal act is being committed, which in its nature tends to the injury of the public (such as an interference with a public highway or a navigable stream), the Attorney-General can maintain an action on behalf of the public to restrain the commission of the act, without adducing any evidence of actual injury to the public, and in such a case an injunction will be granted with costs, although no evidence of actual injury is given.

Attorney-General v. *Great Eastern Railway Company* (1), *Attorney-General* v. *Cockermouth Local Board* (2), and *Attorney-General* v. *Ely, Haddenham, and Sutton Railway Company* (3) considered.

THIS was an action by the Attorney-General, at the relation of two shareholders in the Defendant company and by the two shareholders as Plaintiffs, claiming an injunction to restrain the company from proceeding with their works.

By the *Shrewsbury* (*Kingsland*) *Bridge Act*, 1873, the company were incorporated, and were authorized to construct a bridge over the River *Severn*, a road, and other works, and for this purpose to purchase and hold certain lands, the *Companies Clauses Consolidation Act*, 1845, and the Lands Clauses Consolidation Acts being incorporated with the special Act. The special Act provided that, if the undertaking should not be completed within five years from the passing of the Act, then, on the expiration of that period, the powers by the Act granted to the company for making and completing the same, or otherwise in relation thereto, should cease to be exercised, except as to so much thereof as should be then completed or executed.

The period of five years expired on the 15th of May, 1878, and the company had not within that period completed the works authorized by their Act.

The statement of claim alleged that, notwithstanding the expira-

(1) 11 Ch. D. 449. (2) Law Rep. 18 Eq. 172.
(3) Law Rep. 4 Ch. 194.

tion of the five years, the company were proceeding with the construction of the road, bridge, and other works authorized by the Act, and were interfering with roads and lands for that purpose, and were expending the capital of the company in such construction, and were threatening and intending to interfere with public roads, ways, lands, and hereditaments in the same manner as if they had parliamentary powers authorizing such interference. The Plaintiffs further alleged that the company were about to apply to Parliament to grant them new powers, and to revive their lapsed powers, and that they had already spent, and intended, before obtaining from Parliament powers in that behalf, further to spend moneys raised under the Act of 1873, in and about their application to Parliament. The relators were liable to pay further calls on their shares.

The Plaintiffs claimed an injunction to restrain the company from proceeding with the works originally authorized by the Act of 1873, and from interfering with any roads, lands, or hereditaments for the purpose of the said works, or other purposes not authorized by Parliament, and from applying any of the moneys raised, or to be raised, under the Act of 1873 for the purposes aforesaid, or in or about their contemplated application to Parliament, or for any other purpose not authorized by Parliament.

On the 30th of January, 1880, the Plaintiffs moved before *Jessel*, M.R., for an interlocutory injunction in the terms of their claim. There was evidence that the company had been, since the expiration of the five years, driving piles into the River *Severn*, and interfering with a public highway, and with the towing-path by the river, but there was no evidence of actual damage to the public by reason of these acts. The motion was ordered to stand to the trial, on the undertaking of the Defendants not to do any works off their own land, and not to expend any moneys of the company. In the session of 1880 the company obtained another Act which extended the time for the completion of their works, and thereupon the Plaintiffs agreed that the company should be relieved from their undertaking. On the 17th of April, 1881, the Plaintiffs obtained an order giving them liberty to discontinue so much of their claim in the action as related to matters other than the claim to have the company restrained before

FRY, J.
1882
ATTORNEY-GENERAL v. SHREWSBURY (KINGSLAND) BRIDGE COMPANY.

the passing of the Act of 1880 from executing works off their own land according to the terms of their undertaking, and it was ordered that the relators should pay so much of the Defendants' costs of the action as had been occasioned by so much of the claim as was discontinued, including the costs of the application for the order of discontinuance, and liberty was given to the Plaintiffs to amend their statement of claim, if necessary. On the 16th of May, 1881, the Plaintiffs amended their statement of claim, and claimed only an injunction in the terms of the undertaking, so far as it related to the execution of works off the Defendants' own land before the passing of the Act of 1880, and payment by the Defendants of the costs of the action, other than those already ordered to be paid by the relators.

The action now came on for trial. The evidence was in substance the same as on the hearing of the motion for an injunction. The only question was whether the Defendants ought to be ordered to pay the costs claimed.

W. Phipson Beale, for the relators and Plaintiffs.

Langworthy, for the Defendants:—

An injunction would not be granted unless substantial injury to the public was proved, and therefore the Plaintiffs are not entitled to costs: *Attorney-General* v. *Great Eastern Railway Company* (1); *Attorney-General* v. *Great Northern Railway Company* (2).

[FRY, J., referred to *Attorney-General* v. *Ely, Haddenham, and Sutton Railway Company* (3); *Attorney-General* v. *Cockermouth Local Board* (4).]

FRY, J. (after stating the facts), continued:—

The question which has been mainly argued is this: Had the Attorney-General a right under the circumstances to intervene without shewing substantial injury to the public? It appears to me that there is a conflict of authority on this point, or rather some want of uniformity in the various authorities. But before considering the authorities, I will make this observation. This is clearly a

(1) 11 Ch. D. 449.
(2) 1 Dr. & Sm. 154.
(3) Law Rep. 4 Ch. 194.
(4) Ibid. 18 Eq. 172.

case in which the Defendant company without any power (for their powers had come to an end) thought fit to do certain acts which undoubtedly tended in their nature to interfere with public rights, and so tended to injure the public. The question is whether, under such circumstances, the Attorney-General is justified in interfering, though there is no evidence of actual injury to the public. In my judgment he is entitled to do so, and the Court is bound to attend to his interference. One of the earliest cases on the subject is *Attorney-General* v. *Oxford, Worcester, and Wolverhampton Railway Company* (1). There, at the instance of the Attorney-General, the Court restrained the opening of a railway not authorized by the Board of Trade, and Lord *Romilly*, M.R., said that "the view he took of the case was this, that undoubtedly the Attorney-General might apply to the Court in cases of nuisance. It was properly said on the other side that in all such cases the Court required that the nuisance should be proved. But he was also of opinion that the Attorney-General, as *parens patriæ*" (meaning thereby, I conceive, as the representative of the *parens patriæ*), "might apply to the Court to restrain the execution of an illegal act of a public nature, provided it was established that the act was an illegal act and it affected the public generally." Again, in *Attorney-General* v. *Cockermouth Local Board* (2), *Jessel*, M.R., refused to grant an injunction on the bill, because he came to the conclusion that there was no evidence of any nuisance resulting to the plaintiffs from the defendants' acts. Nevertheless, at the instance of the Attorney-General, he granted an injunction to restrain the defendants from polluting the water of the river, because that was expressly prohibited by Act of Parliament. There, as in the present case, there was no evidence of any actual injury, but there was evidence that the defendants were doing certain illegal acts which tended in their nature to injure the public, and, accordingly, the injunction was granted with costs. In the more recent case of *Attorney-General* v. *Great Eastern Railway Company* (3) the learned Lords Justices appear to have differed somewhat in their opinions. If they had expressed any decided view affecting the

(1) 2 W. R. 330, 331. (2) Law Rep. 18 Eq. 172.
(3) 11 Ch. D. 449.

FRY, J.
1882
ATTORNEY-GENERAL v. SHREWSBURY (KINGSLAND) BRIDGE COMPANY.

present case, I need not say that I should have followed it. But having regard to that difference of opinion, it appears to me that that case furnishes no distinct guide to me. But, when I examine the judgment of Lord Justice *James*, who was the most adverse to the rights of the Attorney-General, I think that, even according to his view, the present action could be maintained, for, commenting on *Attorney-General* v. *Cockermouth Local Board* he said (1), "The board were doing works which would or might probably poison a running stream, in direct violation of the law which prohibited them from committing a nuisance." Just as there the acts which were restrained without proof of injury were acts which in their nature tended to injure the public, so, in the present case, the acts which the Attorney-General sought to restrain were in their nature such as tended to injure the public. In coming, therefore, to the conclusion that this action can be maintained without proof of actual injury to the public, I think I am acting in accordance with the view of Lord Justice *James*. There is, moreover, the authority of Lord *Hatherley* in *Attorney-General* v. *Ely, Haddenham, and Sutton Railway Company* (2). He said (3): "The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed." Here the law has been broken in a manner tending to injure the public, and, in my judgment, the relators are entitled to costs. The costs have not been increased by adding the relators as Plaintiffs, and I shall allow the whole of the costs now in dispute.

Solicitors for Relators and Plaintiffs: *Clarke, Woodcock, & Ryland*, agents for *Clarke & Sons, Shrewsbury.*

Solicitors for Defendants: *Paterson, Snow, & Bloxam*, agents for *Salt & Sons, Shrewsbury.*

(1) 11 Ch. D. 483. (2) Law Rep. 4 Ch. 194.
(3) Law Rep. 4 Ch. 199.

W. L. C.

In re SYMONS.

LUKE *v.* TONKIN.

[1879 S. 575.]

FRY, J.

1882

June 17.

Practice—Administration Action—Executor—Wilful Default—Adding Accounts and Inquiries after Judgment—Rules of Court, 1875, *Order* XXXIII.

When the statement of claim in an administration action against an executor alleges that he has committed wilful default, but the judgment at the trial gives no relief on that footing (the claim to such relief not being, however, dismissed), the Court can at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts and inquiries to be taken and made on that footing.

Job v. *Job* (1) as explained by *Mayer* v. *Murray* (2) followed.

FURTHER CONSIDERATION.

This action was brought for the administration of the real and personal estate over which *Amelia Millett Symons*, a married woman, who died on the 5th of November, 1873, had a power of disposition by will, and for the execution of the trusts of her will.

The Plaintiff was the residuary devisee and legatee under the will; the Defendants were the executors and trustees. The statement of claim alleged that shortly after the death of the testatrix the Defendants possessed themselves of part of the personal estate over which she had a power of disposition by will, but that they had negligently and in breach of the trust reposed in them permitted other parts of the personal estate to remain outstanding. The statement of claim also alleged that the Defendants had in June, 1877, offered for sale real and leasehold estates, over which the testatrix had a power of disposition by will, in lots; that the whole of the property so offered for sale was sold at the sale; that the purchases were not completed until after the day fixed for the completion, and that the Defendants, in breach of their duty as trustees, accepted interest on the various purchase-moneys at a less rate than that which was provided for by the conditions of sale.

In addition to the claim for administration and for the ordinary

(1) 6 Ch. D. 562. (2) 8 Ch. D. 424.

FRY, J.
1882
In re SYMONS. LUKE *v.* TONKIN.

accounts and inquiries, the Plaintiff claimed an order that the Defendants should make good to him the difference between the amount actually received by them on account of interest on the purchase-moneys and the amount which should properly have been received by them for interest. The Plaintiff also claimed such further or other relief as the circumstances of the case might require.

By their statement of defence the Defendants denied the charges made against them.

On the 8th of July, 1880, on a motion by the Plaintiff for such order as upon the admissions of fact contained in the statement of defence he was entitled to, judgment for administration was given directing the ordinary accounts and inquiries to be taken and made. No relief was given on the footing of wilful default by the Defendants, but the action in so far as it claimed relief on the footing of wilful default was not dismissed.

On the 19th of April, 1882, the Chief Clerk made his certificate. In it he stated that the Plaintiff had brought into Chambers a surcharge, whereby he sought to charge the Defendants with several sums of money beyond what they had admitted to have been received by them. These sums were rents due at the death of the testatrix and additional interest on the purchase-moneys of the various lots of the real and leasehold estate which were sold. The Chief Clerk added that, the surcharge being in the nature of a charge of wilful default, and the administration order not empowering him to proceed thereon, he had declined to do so.

The Plaintiff gave notice to the Defendants that, on the hearing of the action on further consideration, he should apply to the Court to order further accounts to be taken and inquiries made on the footing of wilful default. The Plaintiff adduced evidence which, in the opinion of the Court, shewed that there had been wilful default.

Glasse, Q.C., and *G. Daw*, for the Plaintiff:—

A direction to take an account against an executor on the footing of wilful default can be added to an administration judgment at any time if the pleadings raise a case of wilful default, which they do in the present case, and *primâ facie* evidence of

wilful default is given: *Barber* v. *Mackrell* (1): *Job* v. *Job* (2); *Mayer* v. *Murray* (3).

W. Dundas Gardiner, for the Defendants:—

After a judgment has been drawn up the Court has no power to vary it or to add to it in such a way as to make it a new judgment: *In re St. Nazaire Company* (4). To add a direction to take an account on the footing of wilful default to a common administration judgment would be to make a new judgment. In *Mayer* v. *Murray*, *Jessel*, M.R., explained or rather retracted what he had said in *Job* v. *Job*, and the effect of his explanation is that a charge of wilful default cannot be introduced by amendment after judgment. A judgment for administration which does not direct accounts on the footing of wilful default is in effect a judgment that there has been no wilful default.

[FRY, J.:—If so, the action so far as it charged wilful default should have been dismissed.]

Formerly a new action against an executor on the footing of wilful default could not be brought after a common administration decree, without the leave of the Court. The old practice in this respect is not altered by the Judicature Acts: *Laming* v. *Gee* (5). The Plaintiff ought at any rate to have applied by summons in Chambers before the Chief Clerk's certificate was made to have an account on the footing of wilful default added to the judgment. He is too late now. In *Barber* v. *Mackrell* the certificate had not been made.

Glasse, in reply:—

In *Laming* v. *Gee* leave was given to bring a new action. Under the old practice a supplemental bill in the nature of a bill of review charging wilful default could, with the leave of the Court, be filed after an ordinary administration decree: *Hodson* v. *Ball* (6). But in the present case the pleadings contain a sufficient allegation of wilful default, and a sufficient claim for relief on that footing, and this claim was not dismissed by the

(1) 12 Ch. D. 534.
(2) 6 Ch. D. 562.
(3) 8 Ch. D. 424.
(4) 12 Ch. D. 88.
(5) 10 Ch. D 715.
(6) 1 Pr. 177.

FRY, J. 1882 *In re* SYMONS. LUKE v. TONKIN.

judgment. That being so, an account on that footing can be added now: *Barber* v. *Mackrell* (1); *Mayer* v. *Murray* (2).

FRY, J.:—

This case raises a question of very considerable importance as to the mode of proceeding in administration actions. [His Lordship read the allegations in the statement of claim, and the claim for relief, and continued:—] There is clearly in the statement of claim a charge of wilful default against the executors in their not receiving some personal estate which they might have got in, and a charge of breach of trust in their accepting on the unpaid purchase-moneys of real estate which they had sold interest at a lower rate than the purchasers were bound to pay, and though the claim is not in terms for relief on the footing of wilful default, it is, in my judgment, a sufficient claim for relief on that footing. The judgment which has been given is only the ordinary administration judgment; it does not proceed on the footing of wilful default, but the action was not dismissed so far as it sought relief on that footing. In taking the accounts in Chambers the Plaintiff has brought in a surcharge, upon which evidence has been tendered on both sides. The Chief Clerk has declined to go into the matter, because the administration judgment contains no direction to take accounts on the footing of wilful default. The Plaintiff now asks that a direction to take accounts on that footing may be added to the judgment. This raises the important inquiry—in a case where the Plaintiff has charged wilful default in his pleading, but has not obtained a judgment on that footing, can the Court afterwards at any stage of the proceedings order an account to be taken on that footing if evidence of wilful default is adduced? In my opinion there is such evidence in the present case. Considerations of very considerable weight might be urged on both sides. On the one hand, it might be said that it is very important for the Defendants to know at the trial or hearing the mode in which the proceedings will be taken. The old practice was clear, you could not get a decree on the footing of wilful default except at the hearing of the suit. On the other hand, it might be said that it is very convenient that

(1) 12 Ch. D. 534. (2) 8 Ch. D. 424.

there should be power to direct such an account after the judgment, because in many cases the evidence of wilful default comes out naturally in the course of taking the accounts in Chambers. But it is not necessary for me to say what my conclusion would have been if the matter had been unaffected by decision, for, in my opinion, the point has been already adjudicated upon by the Master of the Rolls in *Job* v. *Job* (1) and *Mayer* v. *Murray* (2).

Mr. *Gardiner* says that in *Mayer* v. *Murray* the Master of the Rolls retracted what he had said in *Job* v. *Job*, and laid it down that the old practice still remains. In my opinion, it is impossible so to construe what the Master of the Rolls said. In *Job* v. *Job* he said (3), "I think, however, that under the new practice an order charging him (the executor) with wilful default may be made at any time on a proper case being made." In *Mayer* v. *Murray* he pointed out (4) this qualification, that "an order charging an executor with wilful default could not be made unless he was so charged in the pleadings; therefore the charge, unless originally pleaded, must be introduced by amendment—that is, of course by amendment at any stage of the action at which amendments may be made, that is, before judgment." I understand these two cases to decide this, that if wilful default is charged in the pleadings, and evidence of it is adduced, accounts and inquiries on that footing may be directed at any stage of the proceedings. In my opinion it is very important that one Judge should not attempt to draw fine distinctions between cases before him and similar cases decided by another Judge. Practitioners are much embarrassed by minute differences between the decisions of different Judges, and it is very important to follow a line of procedure which has been already laid down. In my opinion the result of the decisions of the Master of the Rolls in those cases is what I have just stated. I so stated in *Barber* v. *Mackrell* (5), and on further consideration I adhere to what I then said. In the present case there is a charge of wilful default in the pleadings, and there is evidence of wilful default. The Defendants have had notice that these further accounts and inquiries would be asked

(1) 6 Ch. D. 562.
(2) 8 Ch. D. 424.
(3) 6 Ch. D. 564.
(4) 8 Ch. D. 426.
(5) 12 Ch. D. 538.

FRY, J.
1882
In re SYMONS.
LUKE *v* TONKIN.

for on the present hearing, and there is no surprise upon them. Under these circumstances, it appears to me that I am bound to direct the further accounts and inquiries on the footing of wilful default for which the Plaintiff now asks. There will be no difficulty about the details of the order.

Solicitors for Plaintiff: *Coode, Kingdon, & Cotton,* agents for *Borlase, Milton, & Borlase, Penzance.*

Solicitors for Defendants: *Dangerfield & Blythe,* agents for *Thomas Cornish, Penzance.*

W. L. C.

FRY, J.
1882
June 20, 21, 26.

GARTSIDE *v.* SILKSTONE AND DODWORTH COAL AND IRON COMPANY.

[1880 H. 2997.]
[1880 G. 1699.]

Deeds executed on same Day—Priority of Operation—Debentures of Company.

When two deeds relating to the same subject-matter are executed on the same day the Court will inquire which of them was executed first.

But if there is anything in the deeds themselves to shew an intention either that they shall take effect *pari passu,* or that one should take effect in priority to the other, the Court will presume that they were executed in such an order as to give effect to the manifest intention.

One hundred and fifty debentures of a company, each for £100, were all sealed with the company's seal on the same day. They bore the numbers 501 to 650. Each of the first hundred (Nos. 501 to 600) contained a provision that it "and all other debentures of the company to the amount of £10,000 (the amount intended to be now borrowed by the company), or such of them as shall for the time being be due and unpaid, shall be all taken and considered, as between the company and the several holders thereof, as one debenture, and shall not be entitled to any preference or priority by reason of priority of date or otherwise, but shall be paid *pari passu* out of the funds of the company." Each of the other fifty debentures contained a similar provision, substituting the sum of £5000 for £10,000. There was evidence that the company's seal was affixed to the debentures in the order of their numbers, beginning with the earliest. The company being in liquidation:—

Held, that the holders of the debentures for £10,000 were entitled to priority over the holders of the debentures for £5000.

THIS action (with which, by an order of the Court, was consolidated another action which had been commenced by *John George*

Holden and *James Holden*, junior, against the same company for similar objects) was brought by *H. N. Gartside*, *Thomas Drake*, and *J. T. Reynolds*, who were the holders of some debentures issued by the Defendant company, against the company (which was in liquidation); four persons in whom were vested as trustees on behalf of the company certain leases of collieries and other property, situate in the townships of *Higham*, *Dodworth*, and *Barnsley*, in *Yorkshire;* and the holders of other debentures of the company. The statement of claim, as amended after the order to consolidate the two actions, claimed an account of what was due to the Plaintiffs and to the Defendants *John George Holden* and *James Holden*, junior, who were made Defendants after the consolidation, respectively for principal and interest in respect of their debentures, and foreclosure of the other Defendants in default of payment, or for a sale of the mortgaged property and application of the proceeds of sale in payment of what should be found due to the Plaintiffs and the Defendants, *John George Holden* and *James Holden*, junior, respectively.

The company had power to borrow money on the security of debentures.

The Defendants, *John George Holden* and *James Holden*, junior, were the holders of 100 debentures of the company, each for the sum of £100, and numbered respectively from 501 to 600. These debentures were originally issued to those two Defendants jointly with one *Henry Holden*, who had since died, in consideration of a sum of £10,000 advanced by them to the company. By each debenture the company charged all the hereditaments and premises situate in the townships of *Higham*, *Dodworth*, and *Barnsley* belonging to the company, with the payment of the principal sum of £100 and interest to *John George Holden*, *James Holden*, junior, and *Henry Holden*, their executors, administrators, and assigns, in manner therein mentioned. Each of these debentures contained the following proviso:—"Provided always that this debenture and all other debentures of the said company to the amount of £10,000 (the amount intended to be now borrowed by the company) or such of them as shall for the time being be due and unpaid, shall be all taken and considered, as between the said

FRY, J.
1882
GARTSIDE v. SILKSTONE AND DODWORTH COAL AND IRON COMPANY.

company and the several holders thereof, as one debenture, and shall not be entitled to any preference or priority by reason of priority of date or otherwise, but shall be paid *pari passu* out of the funds of the said company."

These 100 debentures were all sealed with the seal of the company on the 27th of April, 1875, and were signed by two of the directors and by the secretary.

The Plaintiffs were the holders of fifty debentures of the company, each for the sum of £100, and numbered respectively from 601 to 650. These debentures were originally issued to the Plaintiff *H. N. Gartside* and one *John Holden*, who had since died, in consideration of a sum of £5000 advanced by them to the company, and they afterwards became vested in the Plaintiffs. Each of the fifty debentures contained a charge by the company of the principal and interest secured by it on the same property which was charged by the 100 debentures with the principal and interest secured by them respectively. And each of the fifty debentures contained a proviso in words identical with those of the above-mentioned proviso in each of the 100 debentures, substituting the sum of £5000 for the sum of £10,000. These debentures were sealed on the same day and signed in the same way as the others.

One of the questions in the action was whether the Defendants *John George Holden* and *James Holden*, junior, were, in respect of their 100 debentures for £10,000, entitled to priority over the Plaintiffs in respect of their fifty debentures for £5000, or whether all the 150 debentures were to be paid *pari passu* out of the assets of the company.

The 150 debentures were all dated the 1st of May, 1875, and were issued in pursuance of the following resolution of the board of directors of the company, passed at a meeting held on the 10th of February, 1875:—"The capital accounts for the six months ending 31st of October, 1874, as per statement submitted, amounted to £12,509 17*s.* 9*d.*, and it was resolved that debenture bonds, dated the 1st of May, 1875, and terminable the 1st of May, 1880, be issued, bearing 5 per cent. interest, to meet expenditure on account of capital."

The evidence shewed that before the 27th of April, 1875, the expenditure on capital account had increased to £15,000. The secretary of the company gave evidence to the effect that the 150 debentures were all sealed with the company's seal on the 27th of April, 1875, that the seal was affixed to them in the order of their numbers, beginning with the earliest number, and that they were handed to the lenders on the 7th of May, 1875.

Cookson, Q.C., and *B. Eyre*, for the Plaintiffs :—

There is no priority as between the holders of the debentures for the £10,000 and the £5000, but they all rank *pari passu*. They were all sealed the same day, and the law does not recognise fractions of a day.

Cozens-Hardy, Q.C., and *S. Hall*, for the company.

Everitt, Q.C., and *Ingle Joyce*, for the holders of the debentures for £10,000 :—

Our debentures are entitled to priority over the debentures for £5000. The rule as to fractions of a day does not apply to such a case. If two deeds were executed the same day, evidence will be received to shew which of them was in fact executed first. There was no notice to us of any intention on the part of the company to borrow more than £10,000. The presumption is that the debentures rank according to their numbers. The law does not for all purposes reject fractions of a day: *Hayes & Jarman's* Concise Wills (1); *Ex parte D'Obree* (2). If two deeds bear date the same day the Court will, in order to effectuate the intention of the parties, presume that the one which ought to precede was executed before the other: *Taylor* v. *Horde* (3); there is no rule of law that they must both be taken to have been executed at the earliest period of the day. The rule that the law disregards fractions of a day is a legal fiction invented for the purpose of doing justice; it has never been applied to the execution of deeds: *Burton's* Compendium (4); *Clarke* v. *Bradlaugh* (5).

(1) 8th Ed. p. 235.
(2) 8 Ves. 82.
(3) 1 Burr. 60.
(4) 7th Ed. p. 192.
(5) 7 Q. B. D. 151.

FRY, J.

1882

GARTSIDE v. SILKSTONE AND DODWORTH COAL AND IRON COMPANY.

J. Pearson, Q.C., and *Chadwyck-Healey*, for the trustees.

H. Burton Buckley, *Farwell*, and *Procter*, for other Defendants.

Cookson, in reply:—

There is as much reason why the debentures for £5000 should have priority over those for the £10,000 as the latter over the former. It is, of course, a question of intention.

[FRY, J.:—But for the clause preventing priority, it seems to me that all the debentures would take effect in the order of their numbers.]

The notion of a debenture is that it forms one of a number of instruments issued at the same time and standing on an equality. The resolution of the 10th of February imports an intention that there should be equality between all the debentures which were issued on the same day.

[FRY, J.:—Suppose two deeds are delivered, each subject to a condition, there being nothing to shew that they are not to have priority according to their dates, and the condition of the second deed is fulfilled before that of the first. Would not the first deed lose its priority?]

There would be no delivery till the condition was fulfilled. The deed of a company does not require delivery, the affixing of the company's seal makes it a complete deed: *Cruise's* Digest (1); *Xenos* v. *Wickham* (2). But these sealed documents were left in the possession of an officer of the company, and they did not have any effect until they were delivered out to the persons entitled to them, *i.e.* not until the 7th of May, when they were all delivered out *uno flatu.*

FRY, J. (after stating the resolution of the 10th of February, 1875), continued:—

It is obvious that this resolution itself contains nothing which shews either the amount for which the debenture bonds were to be issued (unless, indeed, it can be inferred from the statement that

(1) 4th Ed. vol. iv. p. 28. (2) Law Rep. 2 H. L. 296.

the £12,509 was the excess of the capital expenditure over the then existing capital, for such I understand to be the effect of the resolution), or whether all the debentures which were to be issued under it were to rank *pari passu*, or whether some of them were to rank in priority to others.

It appears that in pursuance of the resolution the company negotiated a loan of £10,000 from the three Messrs. *Holden*, and that, after those negotiations had been completed, although before the debentures had been issued, they negotiated another loan of £5000 from Mr. *Gartside* and Mr. *John Holden*, and that on the 27th of April, 1875, the company's seal was affixed to 150 debenture bonds of £100 each. I must, I think, on the evidence take it that the excess of expenditure on capital account over the capital to meet it amounted at that time to £15,000, and that £10,000 of this sum was provided by one set of lenders and £5000 by the other.

It appears that 100 debentures, numbered from 501 to 600 and representing the £10,000, were sealed in the order of their numbers, and that the remaining fifty debentures, numbered from 601 to 650, were also sealed in the order of their numbers, and consequently that the debentures for the £10,000 were sealed before the debentures for the £5000. [His Lordship read the above-stated proviso in the debentures and continued :—] Upon the evidence I conclude that on the 27th of April, 1875, the company had received neither the £10,000 nor the £5000, but that they received those sums on or about the 1st of May, and that on the 7th of May the debentures were delivered to the respective lenders of the £10,000 and the £5000, but in what order the delivery was made does not appear.

In that state of circumstances the holders of the debentures for the £10,000 claim priority over the holders of the debentures for the £5000.

I think the law stands in this way, that when two deeds are executed on the same day, the Court must inquire which was in fact executed first, but that if there is anything in the deeds themselves to shew an intention, either that they shall take effect *pari passu* or even that the later deed shall take effect in priority

FRY, J.
1882
GARTSIDE v. SILKSTONE AND DODWORTH COAL AND IRON COMPANY.

to the earlier, in that case the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties.

The question, then, in the present case is this—the debentures for the £10,000 having been in fact sealed before those for the £5000, is there anything in the debentures themselves to shew an intention that they shall all take effect *pari passu?* In the resolution of the 10th of February, 1875, there is, as I have already said, nothing which throws any light on the question whether the debentures were all to take effect *pari passu* or whether some of them were to have priority over others. The debentures themselves do shew an evident intention that the £10,000 shall form one block and the £5000 another block, an intention, therefore, that the whole £15,000 shall not rank together. It only remains, therefore, to inquire whether the £10,000 is to come before the £5000, or the £5000 before the £10,000. But the debentures for the £10,000 were sealed before those for the £5000, and they bear the earlier numbers, and this, in my judgment, is evidence of an intention that the debentures for the £10,000 are to come before those for the £5000. Is there anything in what took place subsequently to displace this priority? In my judgment there is not. As I have already said, there is nothing to shew which sum was paid to the company first, or which set of debentures was delivered to the lenders first.

I think, therefore, I must assume that the debentures for the £10,000 maintained the priority which they originally had over the debentures for the £5000. A deed executed by a company requires no delivery to make it effectual; therefore there could be nothing whatever in the nature of delivery as an escrow, and the deed was complete the moment that it received the seal of the company. I do not forget that the company retained the debentures after they were sealed, as they were entitled to do until they received the money for them, nor do I mean for one moment to indicate that the debenture-holders could have sued the company upon the debentures before the actual delivery to them, or the actual payment of the money by them. But I mean that, there being no condition imposed, the question whether the prior satis-

faction of the condition gives priority does not arise. I therefore declare that the debentures for the £10,000 have priority over those for the £5000.

Solicitors for Plaintiffs: *Burn & Berridge*, agents for *Gartside & Robinson, Ashton-under-Lyne.*

Solicitors for the company: *Pritchard, Englefield, & Co.*, agents for *Grundy, Kershaw, & Co., Manchester.*

Solicitors for the trustees and some debenture-holders: *Flux & Leadbitter*, agents for *Addleshaw & Warburton, Manchester.*

Solicitors for the debenture-holders for £10,000: *Gregory, Rowcliffes, & Co.*, agents for *Welsh & Son, Manchester.*

Solicitors for other Defendants: *Dollman & Pritchard.*

W. L. C.

In re GREAT WESTERN (FOREST OF DEAN) COAL CONSUMERS' COMPANY.

Company—Winding-up—Wishes of Creditors—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91 [*Revised Ed. Statutes, vol. xiv., p.* 222].

In determining whether regard should be paid to the wishes of creditors who oppose the making of a winding-up order, the Court ought to consider not only the number of the creditors and the amount of their debts, but also the reasons which they assign for their conclusion.

The *primâ facie* right of an unpaid creditor of a company to a winding-up order is rebutted when it is shewn that a large mass of other creditors oppose the making of such an order.

A creditor's winding-up petition ordered to stand over for six months upon terms similar to those imposed in *In re St. Thomas' Dock Company* (1).

THIS was a creditors' petition for the winding-up of the company. The company was incorporated by registration under the *Companies Acts*, 1862 and 1867, as a company limited by shares, on the 22nd of March, 1873, for the purpose of purchasing and working certain collieries in the *Forest of Dean.* The nominal capital was £120,000, in 6000 shares of £20 each, of which 1185 had been issued and were fully paid up.

On the 19th of July, 1875, the company executed a mortgage

(1) 2 Ch. D. 116.

FRY, J.
1882
In re GREAT WESTERN (FOREST OF DEAN) COAL CONSUMERS' COMPANY.

of their collieries to secure the payment of £10,000, with interest, to *Henry Crawshay*, and the further sum of £10,000, with interest, to *William Crawshay*. These two sums were to rank *pari passu*.

On the same day the company executed a second mortgage of their collieries to the trustees of the *Gloucestershire Banking Company* to secure £10,000 and interest, and on the 16th of January, 1878, they executed a further charge on the same property in favour of the trustees of the bank to secure £5416 and interest.

The company also at different times issued debentures to the amount in the whole of £49,900, which were secured by a mortgage of the collieries and all other the property of the company. These debentures, to the extent of £15,000, were held by *Henry Crawshay*. The petition was presented by the executors of *Henry Crawshay*, who was dead, in pursuance of leave given by the Court in an action by creditors to administer his estate. At the date of the petition there was due by the company to the estate of *Henry Crawshay* under the mortgage of the 19th of July, 1875, £10,000 for principal and £4000 for arrears of interest, and similar sums for principal and interest were due to *William Crawshay*. There was due to the *Banking Company* on their second mortgage £10,000 for principal, the further charge of £5416, and about £3000 for interest. The whole of the debentures were outstanding, and there was a large arrear of interest due thereon. The *Banking Company* were also unsecured creditors to the extent of £23,554, and there were other unsecured creditors to the amount of £500.

The petition was opposed by the company, by the *Banking Company* (who had contracted to purchase *William Crawshay's* mortgage debt), and by debenture holders for the amount of £33,100. The bank were also contemplating the purchase of *Henry Crawshay's* mortgage debt. Another petition to wind up the company had been presented in Vice-Chancellor *Bacon's* Court by a Mrs. *Ashmead*, who was the holder of debentures to the amount of £800.

The present Petitioners alleged that if the property comprised in their mortgage was sold it would not realize sufficient to pay what was due to them on their security. This allegation was denied by the company and by the creditors who opposed the

petition, and they said that the position of the company was improving, and that if it was allowed to continue its business they believed it would be able to pay the interest on all the sums borrowed, and gradually to extinguish the mortgage debt. The balance sheet of the company for the year ending the 30th of June, 1881, shewed for the first time for many years a profit of £2450 on the working, and, so far as the workings for the year ending the 30th of June, 1882, had been ascertained, there was every prospect that the improvement would appear to have been maintained.

The assets of the company not included in the specific mortgages were estimated not to exceed £1000 in value.

Glasse, Q.C., and *W. Phipson Beale*, for the petition of *Henry Crawshay's* executors:—

The company is clearly insolvent, and this is really admitted, and therefore a winding-up order ought to be made.

Ryland, for shareholders, supported the petition.

Maidlow, for Mrs. *Ashmead*, asked that a winding-up order might be made on both petitions.

Cookson, Q.C., and *H. Burton Buckley*, for the bank:—

The petition ought to be dismissed. The Petitioners hold security for their debt. If their security is sufficient, as we say it is, they have no interest in a winding-up; they can get paid by realizing their security. If their security is insufficient, still practically the whole of the company's assets are mortgaged for more than their full value, and there will be nothing for the liquidator to receive, certainly not more than enough to pay the costs of winding up. A winding-up order ought to be made only for the purpose of realizing and distributing assets, and here there are none to realize. A winding-up order can clearly do no good to any one, and it would prevent the earning of a profit by working the company. By sect. 91 of the *Companies Act*, 1862, "the Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as

FRY, J.
1882
In re GREAT WESTERN (FOREST OF DEAN) COAL CONSUMERS' COMPANY.

proved to it by any sufficient evidence," and "regard is to be had to the value of the debts due to each creditor." In the present case the amount of the debts due to the creditors who oppose the winding-up very largely exceeds the amount due to those who support it.

Though a creditor, who cannot get otherwise paid, is entitled to a winding-up order *ex debito justitiæ* it does not follow that the order should be made at once, but the Court has power to order the petition to stand over: *In re Western of Canada Oil, Lands, and Works Company* (1). In *In re St. Thomas' Dock Company* (2), under circumstances very similar to those of the present case, *Jessel*, M.R., ordered a winding-up petition to stand over for six months on certain terms, and in *In re Uruguay Central and Hygueritas Railway Company of Monte Video* (3), *Jessel*, M.R., dismissed a creditor's winding-up petition on the ground that the other creditors opposed it, and that the Petitioner could obtain no advantage by a winding-up order.

J. Pearson, Q.C., and *Warrington*, for the company, adopted the same arguments.

Glasse, in reply:—

If we enforced our security the business would be stopped just as much as if a winding-up order were made. The only question, therefore, is whether the business shall be stopped in one way or the other. In *In re St. Thomas' Dock Company* there were no assets but those which were charged by the debentures; here the loose chattels and stock-in-trade are not comprised in the mortgages.

[FRY, J.:—They are comprised in the debentures. The only asset in the winding-up would be the equity of redemption.]

The coal is included in our mortgage, and the company are working it. The produce of it is applicable to the payment of our interest, and the company are applying it to other purposes.

FRY, J. (after stating the facts), continued:—

The Petitioners represent one moiety of the first mortgage debt

(1) Law Rep. 17 Eq. 1. (2) 2 Ch. D. 116.
(3) 11 Ch. D. 372.

of £28,000, and debentures for £15,000, and they are supported by another debenture holder for £800. They, therefore, represent a capital debt of £29,800, and they ask for the immediate winding-up of the company.

Opposed to them are the bank, who are second mortgagees for £18,400, persons holding debentures for £33,100, the bank, who are unsecured creditors for £23,500 and, as I understand, *William Crawshay's* moiety of the first mortgage debt (which has been purchased by the bank) amounting to £14,000. The Petitioners are therefore opposed by creditors representing, as I make out, debts amounting to £89,000. So that if I am to proceed upon a consideration of the respective amounts due to the creditors who support and oppose the petition, without regard to their priorities, there are, roughly speaking, creditors whose debts amount to £30,000 supporting the petition, and creditors for £89,000 opposing it.

That the Court may have regard to the wishes of creditors in the matter of a winding-up is part of the statutory enactments which regulate the Court in this jurisdiction. That it ought so to have regard to those wishes is apparent from the statute itself, as well as from a series of decisions. As against the company I conceive that, *primâ facie*, a person who is shewn to have a debt which the company does not satisfy has a right *ex debito justitiæ* to a winding-up order. But that *primâ facie* right may be rebutted, and especially as against other creditors, the moment it is shewn that there is a large mass of other creditors who are opposed to the winding-up. That is the inevitable result of sect. 91. And, in my judgment, the Court ought to consider, not merely the number of the opposing creditors and the value of their debts, but ought to have some regard to the reasons which they adduce for the conclusion at which they have arrived.

Now, in the present case, the opposing creditors suggest that the company has for many years been in adverse circumstances consequent on the depressed condition of the coal trade in *England*. They shew that large sums of money have been expended on these collieries. They shew that recently a small profit has begun to accrue, and they state, with some show of reason, grounds for hoping that the future may be more profitable than the past.

FRY, J.
1882
In re GREAT WESTERN (FOREST OF DEAN) COAL CONSUMERS' COMPANY.

I think, therefore, that the opposing creditors are not without good reason in saying that they desire that the company should not now be wound up, and in that state of circumstances I hold that I must have regard to the wishes of the opposing creditors, because they own a much greater amount of the debt than the Petitioners, and because the grounds which they allege are perfectly trustworthy. I think, therefore, that I ought not in the present circumstances to accede to the application for an immediate winding-up order.

I come to the same conclusion on another ground, viz., that, as matters now stand, it appears to me the Petitioners would gain nothing if the company were wound up,—I mean, nothing beyond the realization of their securities. In the winding-up I should have to administer only the equity of redemption of the company's property after satisfying the securities. Now, so far as I can learn from the evidence before me, all the substantial property of the company is included either in the first or the second mortgage, or in the further charge, and whatever is not included in them is swept up by the debentures. The debentures are largely held by the Petitioners themselves, or rather by the estate which they represent. I think, therefore, that at the present time, no practical good can result from a winding-up order. And this is the second reason why I decline at the present moment to grant the prayer of the petition.

Then arises this question—Ought I to dismiss the petition at once, or ought I to delay my decision, and order the petition to stand over? I think the latter is the better course for the creditors and for the company also, and I propose to order the petition to stand over for a definite period of six months, or until the Petitioners shall within that time take some step to enforce their mortgage securities, intending of course that if they do take any such step the petition may be brought on again before me, and I shall then know how to deal with the costs of it. I think that by ordering the petition to stand over, I shall put pressure on the Petitioners not to take a step to enforce their securities, which I think would be injurious to the company and the other creditors, because it might possibly lead to the distribution and dismemberment of the property by means of which the

company carry on their business. I think, therefore, it is more in the interest of the opposing creditors that I should allow the petition to stand over in this way, than that I should immediately dismiss it. Therefore, on the company entering into an undertaking not to consent to a winding-up order on any other petition, or to wind up voluntarily, and to give the Petitioners notice in writing of the presentation of any other winding-up petition and of any proceedings by any mortgagee or debenture holder to enforce his security, or to obtain payment of his debt, and not to raise any objection to this petition being brought on in case any other petition should be presented, I shall order the petition to stand over for six months from this day, or until the taking of any step by the Petitioners or any other creditor to enforce payment of their debt, or to realize their security, and then I shall give liberty to apply.

Then with regard to Mrs. *Ashmead's* petition, I understand that Mr. *Maidlow* is willing to give a similar undertaking. It will be transferred to this branch of the Court, and it will stand over for the same period as the other petition, and come on with it.

Solicitors: *Clarke, Woodcock & Ryland; Jones, Blaxland, & Son; Wilkins, Blyth, & Dutton.*

W. L. C.

KAY, J.

1882

June 30.

In re J. CLARKE'S ESTATE.

Costs—Railway Company—Payment out of Court—Fund exceeding £500 *not dealt with for Fifteen Years—Costs of Official Solicitor—Chancery Funds Rules*, 1874, *r.* 91—*Chancery Funds Amended Orders*, 1874, *r.* 14.

Where a fund in Court exceeding £500 in value and representing the purchase-moneys of settled lands taken by a railway company, with accumulated interest, had not been dealt with for upwards of fifteen years, and it had become necessary under the Chancery Funds Rules, 1874, r. 91, and the Chancery Funds Amended Orders, 1874, order 14, to serve the official solicitor with the petition for the payment out of the fund:—

Held, first, that his costs were not payable by the railway company; secondly, that such costs having been occasioned by the default of the tenant for life, were properly payable out of the portion of the fund which came to his estate.

JOHN CLARKE (who died in 1850) by his will devised, *inter alia*, two freehold cottages at *Barnsley* to trustees upon trusts for *Anne Parker* and her husband, *Edward Parker*, during their respective lives, and after the death of the survivor of them for their children as tenants in common.

In 1852 these cottages were taken by the *South Yorkshire and River Dun Railway Company* under the powers of their Act, and the purchase-moneys, amounting to £425, were paid into Court and invested in consols under the *Lands Clauses Consolidation Act*, 1845.

Anne Parker died in January, 1860, and the dividends on the fund in Court were duly received and applied by the trustees down to January, 1864, but since that time the fund had apparently been lost sight of.

Edward Parker became bankrupt in 1868, and died in 1869.

A petition was now presented by the children of Mr. and Mrs. *Parker*, and the surviving trustee of the will, for the payment out of the fund in Court; and as the capital and accumulated dividends exceeded in value the sum of £500, and it had accordingly become necessary under the 91st of the Chancery Funds Rules, 1874, and the 14th of Chancery Funds Amended Orders, for the Petitioners to serve the official solicitor of the Court, the question was how his costs were to be paid.

J. Kaye, for the official solicitor:—

In a similar case of *In re Wainman* Mr. Justice *Fry* held this morning, that the costs of the official solicitor were not costs of taking the lands, and accordingly were payable not by the corporation, but by the Petitioners.

Popham, for the Petitioners:—

In this case the Petitioners are not responsible for the non-receipt of the dividends, and the necessity for serving the official solicitor has arisen through the neglect of the tenant for life. In such a case the costs of the official solicitor ought not to be paid out of the moneys coming to the Petitioners. Costs of adverse litigation constitute the only exception to the costs payable by a railway company under the 80th section of the *Lands Clauses Consolidation Act*, 1845.

Simmonds, for the railway company:—

If by the act or neglect of the parties beneficially interested complications arise after the purchase-moneys have been paid in by the railway company, the company cannot be called upon to pay the costs occasioned thereby.

B. B. Rogers, for the assignee in bankruptcy of *Edward Parker*.

Reference was made to *Morgan's* Chancery Acts and Orders (1).

KAY, J.:—

The railway company must pay all the costs of the payment out of the fund except the costs of the official solicitor; and those costs are in this case properly payable out of the portion of the fund which goes to the estate of the tenant for life.

Solicitors: *Wilkinson & Son; The Official Solicitor; S. B. Somerville; Cree & Sons.*

(1) 5th Ed. pp. 425, 429.

W. W. K.

KAY, J.
1882
June 30.

In re MOORE.
McALPINE *v.* MOORE.

[1882 M. 1201.]

Trustee Act, 1850—*Interpretation Clause—No Trustee appointed by Will—Appointment of Trustee to perform Duties incident to Office of Executor.*

Where a testator had, by his will, left all his property to his wife for life, and appointed her his sole executrix, and had also left legacies of considerable amount to be paid after her death, but had not constituted any persons trustees thereof:—

Held, upon petition intituled in an administration action commenced for the purpose and in the *Trustee Act*, 1850, that upon the retirement of the widow the Court had jurisdiction under the *Trustee Act*, 1850, to appoint in her place a trustee or trustees to perform the duties incident to the office of an executor.

THE late Mr. *John Moore*, by his will, dated in 1881, left all his real and personal property to his widow for life, and appointed her his sole executrix, and he left various legacies (some of which were of very large amount, one being of £30,000) to be paid after her death, but he did not by his will constitute any persons trustees thereof.

His personal estate was sworn under £100,000, all his debts and the legacies payable during his widow's life had been paid, and his widow, who was seventy years of age, was desirous that trustees should be appointed of the testator's personal estate for the purposes of his will. An action for the administration of the testator's personal estate was accordingly commenced by one of the reversionary legatees against the widow, and after service of the writ a petition was presented in the action by the Plaintiff and the Defendant and another of the reversionary legatees. This petition stated that no one was desirous of having, nor would it be beneficial to any person interested to have, the testator's personal estate administered by the Court if the Court thought fit to appoint trustees of the will; and after submitting that the widow was a trustee of the testator's personal estate for the purposes of his will within the meaning of the *Trustee Acts*, stated that she was desirous of retiring from such trusteeship, but that it was

impracticable to appoint new trustees of such personal estate without the assistance of the Court. The petition then prayed for the appointment of two persons as trustees of the personal estate of the testator for the purposes of his will, in substitution for the widow, for a vesting order as to the personal estate, and for stay of further proceedings in the action, and that the costs of the action and of the petition might be paid by the new trustees out of the personal estate of the testator.

Renshaw, in support of the petition (which was also intituled in the *Trustee Acts*), submitted that although no trustees had been appointed by the will, the Court could either appoint trustees in the administration action in exercise of its inherent jurisdiction: *Dodkin* v. *Brunt* (1); or could by the combined operation of the 32nd section of the *Trustee Act*, 1850, and the interpretation clause of that Act, make the appointment thereunder.

[He referred to *In re Smirthwaite's Trusts* (2), *In re Gillett's Trusts* (3), and *Re Davis's Trusts* (4).

KAY, J.:—

I think that the difficulty is removed by the interpretation clause of the *Trustee Act*, 1850, which defines the words "trust" and "trustee" as extending to and including "the duties incident to the office of personal representatives of a deceased person," so that although the Court cannot remove an executor, it can appoint a trustee or trustees to perform the duties of an executor, which in this case means to pay the legacies when they became payable.

Solicitors: *Wharton & Ford.*

(1) Law Rep. 6 Eq. 580.
(2) Law Rep. 11 Eq. 251.
(3) Weekly Notes, 1876, p. 251.
(4) 19 W. R. 944.

W. W. K.

KAY, J.

1882

July 5.

ROBINSON *v.* OMMANNEY.

[1882 R. 626.]

Will—Revocation—Covenant not to revoke—Restraint of Marriage—Contingent Liability—Bankruptcy—Discharge—Proof.

A covenant not to revoke a will is not necessarily against public policy, as being in restraint of marriage.

A mortgagor not a trader appointed certain property by will as a security to the mortgagee, and covenanted not to revoke the will. She became bankrupt under the *Bankruptcy Act*, 1849, and obtained her discharge:—

Held, that the contingent liability under the covenant not to revoke was incapable of proof under the bankruptcy, and that an action would lie for damages for breach of the covenant committed after her discharge.

Affirmed on appeal 19 Ch. D. 285 C.A.

JOHN BOHN made his will on the 19th of June, 1841, and thereby gave the annual proceeds of £5000 which he directed to be invested in consols to *Lydia Bohn* for life, and after her decease upon trust for such persons as she should by will appoint, and in default of appointment for her next of kin.

After the death of *John Bohn* the trusts of his will were administered in a suit, and £1202 15*s.* 7*d.* Bank £3 per Cent. Annuities were carried over to the credit of the suit to the account of *Lydia Bohn's* legacy for life.

Lydia Bohn executed a deed of mortgage on the 5th of February, 1859, whereby she assigned to the mortgagee, *Henry Robinson*, the dividends on the said sum of £1202 15*s.* 7*d.* Bank Annuities, together with a policy of assurance on her life, as a security for moneys lent and to be lent, and the deed contained a covenant by *Lydia Bohn* that she would forthwith duly make her last will pursuant to and in exercise of the power given to her by the will of *John Bohn*, and would by her will appoint unto *H. Robinson*, his heirs, administrators, and assigns, the principal sum of £1202 15*s.* 7*d.*, upon trust to pay thereout to him and them the principal money and interest for the time being due under the mortgage, and that she should not do or commit any act, deed, matter, or thing by means whereof the said will so to be made by her should be revoked, annulled, cancelled, obliterated, impeached, or affected in any manner howsoever.

Lydia Bohn made a will in accordance with this covenant dated the 7th of February, 1859, and delivered it to *H. Robinson*.

Lydia Bohn was adjudicated a bankrupt on the 10th of April, 1862, and on the 4th of June, 1862, she was discharged by an order of the Court of Bankruptcy.

On the 28th of August, 1876, *Lydia Bohn* made another will, by which she gave all her estate and effects to trustees, one of whom was *Francis Ommanney*, the Defendant, and in exercise of the aforesaid power she appointed and bequeathed to her executors, *inter alia*, the sum of £1202 15*s.* 7*d.* Bank Annuities, and all other legacies, sums, and funds over which she had any power of appointment or disposition under the will of her said father or otherwise, and she revoked all other wills made by her, and she died on the 3rd of April, 1880, and the will of the 28th of August, 1876, was proved on the 12th of August, 1880.

At the time when this action was brought £710 8*s.* 9*d.* was due under the mortgage for principal, interest, and costs.

H. Robinson having died on the 27th of February, 1870, his executors brought this action, claiming £710 8*s.* 9*d.* damages for the breach of the covenant not to revoke the will of the 7th of February, 1859.

The defendant demurred.

Cookson, Q.C., and *J. G. Wood*, for the demurrer:—

The appointment was a fraud upon the power, the power being general, while the appointment was the result of an agreement to mortgage.

The covenant not to revoke the will was in restraint of marriage, as marriage is one of the modes of revoking a will: *Price* v. *Green* (1).

The discharge of *Lydia Bohn* by the Court of Bankruptcy put an end to any liability under the covenant: *Thompson* v. *Cohen* (2); *Cole* v. *Kernot* (3).

J. Pearson, Q.C., and *Finch*, for the Plaintiff:—

The possible breach of covenant could not be proved in the

(1) 16 M. & W. 346.
(2) Law Rep. 7 Q. B. 527.
(3) Law Rep. 7 Q. B. 534, n.

KAY, J.
1882
ROBINSON
v.
OMMANNEY.

bankruptcy. The cases of *Lyde* v. *Mynn* (1), *Metcalfe* v. *Hanson* (2), and *Collyer* v. *Isaacs* (3) were decided under the Act of 1869, which contains wider words than the previous Acts as to what liabilities are proveable.

The covenant not to revoke was not void: under the old law such covenants were allowed. In *Sheppard's* Touchstone (4) it is laid down that "when a man covenants not to revoke or alter his will, this covenant will not control the will or bar the party of his right to alter it. It will merely give a right to damages if the covenant be broken." And Lord *St. Leonards*, in his book on Powers (5), says that the donee of a power to appoint by will who appoints by will and covenants not to revoke the appointment "has still full power to revoke the will; the performance of the covenant cannot be enforced, but damages only can be recovered for a breach of it."

KAY, J.:—

This demurrer raises some questions of considerable interest. The effect of the will of *John Bohn* was to give a sum of £5000 invested in consols to *Lydia Bohn*, with power to appoint the capital absolutely by will, and in default of appointment to her next of kin. *Lydia Bohn* mortgaged her life interest in the consols, and covenanted to exercise the power by her will in favour of the mortgagee. Subsequently she, not being a trader, became a bankrupt, and obtained an order of discharge from the Court of Bankruptcy. The Bankruptcy Act then in force was that of 1861 with so much of the previous law as was not repealed by that Act.

After she obtained her discharge she made another will, by which she appointed the fund away to other persons, which was a distinct breach of the covenant. She has died, and this action is brought by the executors of the mortgagee against the executors of *Lydia Bohn*, asking for damages for the breach of the covenant not to revoke the first will.

Several points have been argued before me. It was contended

(1) 1 My. & K. 683.
(2) Law Rep. 1 H. L. 242.
(3) 19 Ch. D. 342.
(4) Vol. ii. p. 401.
(5) 8th Ed. p. 214.

that the exercise of the power by the will was void *ab initio* as a fraud upon the power. [His Lordship considered the arguments on this point, and decided that the will was good.] Secondly, it was contended that the covenant was void because the terms of it were that she would not revoke her will, and one of the modes of revocation being marriage, such a covenant would be in restraint of marriage. But I cannot accede to this argument, notwithstanding its ingenuity. The answer appears to me to be that if the covenant is expanded into its full meaning it is a covenant not to burn the will, and not to perform the other acts of revocation specified in the Wills Act, including a covenant not to marry. I may read this therefore distributively, and hold that the covenant not to revoke by the other methods of revocation is good, though so far as it included a covenant not to marry it might be bad. Before the Wills Act such a covenant would be good, as appears by the passage from *Preston's* edition of *Sheppard's* Touchstone (1), quoted by Mr. *Pearson*. At the date when that book, which is of great authority, was written, viz. 1821, the law was that marriage in the case of a woman, or in the case of a man marriage and the birth of a child would revoke a will, and certainly an implied covenant not to marry and have children, or that if the covenantor married he would not have children, would be as bad as an implied covenant not to marry. Lord *St. Leonards*, in the passage also cited by Mr. *Pearson*, published since the *Wills Act*, says that damages can be recovered for a breach of a covenant not to revoke the appointment. For these reasons I hold that the covenant not to revoke the will was a lawful covenant.

Then it is said, thirdly, that this covenant cannot be enforced since the bankruptcy of *Lydia Bohn*, because a proof in respect of the future breach might have been carried in under the bankruptcy. There are several authorities on this point which are somewhat difficult to deal with. In *Collyer* v. *Isaacs* (2), which was a case under the *Bankruptcy Act* of 1869, a debtor assigned chattels then at his place of business and thereafter to be brought thereon, and he became bankrupt, and after his discharge brought new chattels on to his place of business: it was held that the assignment of chattels afterwards to be brought on to the place of

(1) Vol. ii. p. 401.

(2) 19 Ch. D. 342.

KAY, J.
1882
ROBINSON
v.
OMMANNEY.

business was a mere contract to assign, and that the breach of that contract was a liability which might have been proved in the bankruptcy, and that it was discharged by the discharge in bankruptcy. The Master of the Rolls there said (1), "without saying that the discharge would apply to a marriage settlement containing a covenant to settle after-acquired property, when you have a debt, and a covenant to secure that debt in a particular way, it would be a strange result if you could bar the debt and not what I may call the ancillary covenant .... the result might be that the debtor never could get free or obtain a fresh start in life." The same ground of decision appears to have prevailed with all the Judges who decided that case, and they held that by the 49th section of the Act the liability was discharged.

That case is binding on me if the circumstances of the present case are similar; but it must be remembered that the powers of proof given by the Act of 1869 are wider than those which were in force when *Lydia Bohn* became bankrupt in this case. The 178th section of the *Bankruptcy Act* of 1849 applied only to traders, and *Lydia Bohn* was not a trader, neither was her liability one "to pay money on a contingency," the meaning of which words was discussed in the case of *Mitcalfe* v. *Hanson* (2).

But then it is said that the covenant is ancillary to the debt, and that as the debt was discharged the liability under the covenant is also discharged, that the consideration for the covenant being gone, no relief can be given upon it. But the covenant did not so much affect the mortgage debt as the security given for the mortgage debt, and a covenant being by deed imports consideration. Suppose the case of a mortgage in the form of an agreement to mortgage certain property, and an agreement, not a covenant, to bring into the security other specified property to which the mortgagor had the hope of succeeding under some will or by inheritance; then if the argument is good that the consideration is destroyed by the bankruptcy of the mortgagor, an action brought after bankruptcy to compel the assignment of the specified property must fail, though the rest of the agreement would be binding; but it could not be held that there would be consideration enough left to compel the completion of one part

(1) 19 Ch. D. 352. (2) Law Rep. 1 H. L. 242.

of the agreement and not of the other. I think, therefore, that in this case the consideration for the contract to complete the security to the mortgagee is not destroyed by the discharge in bankruptcy. Take another mode of testing the matter. We may suppose an ordinary mortgage with the usual covenant for further assurance, it could not be said that because the covenantor became bankrupt and was discharged from personal liability for the debt that the consideration is thereby gone, and the covenant for further assurance cannot be enforced.

I think that the case before me comes much nearer to *Lyde* v. *Mynn* (1) than to *Collyer* v. *Isaacs* (2), and that the valuable consideration for the covenant was not destroyed by the discharge in bankruptcy.

It also seems to me that the breach of the covenant in this case cannot be said to have taken place until after the bankruptcy, when the lady by her second will for the first time revoked the previous appointment. It was then that she first committed the breach and then only did the cause of action arise, so that it could not have been made the subject of a proof in the bankruptcy, especially against a person not a trader under the Act of 1849.

I hold, therefore, that the Plaintiff's action will lie, and the demurrer must be overruled.

Solicitors: *G. B. Wheeler; Sutton & Ommanney.*

(1) 1 My. & K. 683. (2) 19 Ch. D. 342.

C. W. C.

KAY, J.
1882
July 3, 7.

In re JACKSON.
JACKSON *v.* TALBOT.

[1881 J. 197.]

Infant—Real Estate—Power of Court to mortgage for Repairs.

When an infant was absolutely entitled subject to certain trusts to the beneficial interest in real estate, the legal estate being in trustees:—

Held, that the Court had jurisdiction to direct the raising of money by means of a mortgage of the estate, for the purpose of paying the cost of repairs certified by the Chief Clerk to be absolutely necessary.

FURTHER CONSIDERATION.

This action was brought for the administration of the real and personal estate of *Joseph Jackson*, who died on the 10th of June, 1870, and to have the rights and interests of the Plaintiffs and other beneficiaries in his estate ascertained and declared. By his will the testator had devised part of his real estate to trustees, on trusts which might not exhaust the whole beneficial value of it, and as to the residue of his real estate he died intestate. His heir-at-law was *Thomas Jackson*, one of the Defendants, who was an infant. The real estate devised in trust consisted in part of houses which required repairing, and it was now proposed to mortgage the devised real estate in order to raise money to pay for the repairs.

Kenyon Parker, for the Plaintiff, asked that an inquiry might be directed in Chambers what repairs ought to be done, and that the estimated cost of the repairs might be raised by a mortgage of that part of the real estate: *Allan* v. *Backhouse* (1). In such cases as *Drake* v. *Trefusis* (2) it was held, as between tenant for life and remainderman, that money which was to be invested in the purchase of land might be ordered to be employed in erecting new buildings on land already settled to the same uses.

[KAY, J.:—But the Court would not sanction the employment of such money in repairs or in permanent improvements which did not place new buildings on the land.]

(1) 2 V. & B. 65. (2) Law Rep. 10 Ch. 364.

Re Allan Re Silverlock ante 2 Seton 735.

Frith v. *Cameron* (1); *Garmstone* v. *Gaunt* (2).

[KAY, J.:—There are no doubt cases in which, when the guardian of an infant has properly expended money in improving real estate of the infant, the Court has authorized the raising of the money so expended by a mortgage of the estate. But I am not aware that a prospective charge has ever been sanctioned, and I doubt whether the Court has jurisdiction to do that.]

Glover v. *Barlow* (3) (before the Vice-Chancellor of *England*, 1831), cited in *Chambers* on Infancy (4), and in *Simpson* on Infants (5), appears to be directly in point. There it is stated that the Court has directed the costs of necessary repairs or improvements to an infant's estate to be raised by sale or mortgage.

[KAY, J.:—Sect. 42 (sub-sects. 2, 3) of the *Conveyancing and Law of Property Act*, 1881, enables trustees for an infant to manage land to which he is entitled, with power to repair houses, and to pay the expenses incurred in the management or in the exercise of any power conferred by the section, out of the income of the land. This seems to exclude the notion that it was intended that there should be power to pay the expenses of management out of the *corpus*.]

Charles Church, for the Defendants.

KAY, J.:—

You had better search the record of *Glover* v. *Barlow*. If you can furnish me with a precedent for making such an order, I will make it.

July 7. *Kenyon Parker*, for the Plaintiff:—

There appear to be three classes of cases upon alienation of infants' property:

1. Those in which there was a tenant for life and an infant entitled in remainder, and it was proposed to charge the infant's estate in remainder with a sum for repairs. In such a case no

(1) Law Rep. 12 Eq. 169.
(2) 1 Coll. 577.
(3) Unreported.
(4) Pages 568, 596.
(5) Page 330.

KAY, J.
1882
In re JACKSON.
JACKSON *v.* TALBOT.

charge would be sanctioned, upon the principle that it was the duty of the tenant for life himself to repair: *Hibbert* v. *Cooke* (1); *Dent* v. *Dent* (2).

2. Those in which the infant was absolutely entitled, and the proposition was to sell his whole estate upon the ground that a sale would be for his advantage. In these cases the Court has held that it had no jurisdiction to direct a sale: *Daly* v. *Daly* (3); *Peto* v. *Gardner* (4); *Calvert* v. *Godfrey* (5).

3. Those in which the infant was absolutely entitled, and the proposition was to sell or mortgage a part of his estate in order to defray the cost of the repairs of other parts of it, and there the Court has sanctioned the sale or mortgage, upon the principle of salvage: *Glover* v. *Barlow* (6); *Dunlop* v. *Webster* (7); *Frith* v. *Cameron* (8).

I have examined the record of *Glover* v. *Barlow*, and it appears to me to be directly in point (9).

(1) 1 S. & S. 552.
(2) 30 Beav. 363.
(3) 2 J. & Lat. 752.
(4) 2 Y. & C. Ch. 312.
(5) 6 Beav. 97.
(6) Unreported.
(7) *In re Smith*, *Dunlop* v. *Webster* (1878 S. 363). V.-C. M. (at Chambers) 16 March, 1880. Vacation Judge (at Chambers) 29 Sept. 1880.
(8) Law Rep. 12 Eq. 169.
(9) *Glover* v. *Barlow* (V.C. of *England*, 1831). This was a suit by the executors and devisees in trust of the will of *Henry Walker*, against two infants, who were beneficially interested thereunder in certain specific leaseholds and freeholds, and were between them entitled to his residuary real and personal estate, to have the real and personal estate of the testator administered by the Court. The testator's property comprised certain dilapidated and ruinous leasehold and freehold houses, and others which had fallen down, while some were in process of repair at the time of his death, which repairs had since been completed by the Plaintiffs. On the 23rd of July, 1831, an administration decree was made and inquiries were directed (*inter alia*) as to the state of the testator's property, and what rebuilding and repairs were necessary and proper to be done, and whether it would be proper and for the benefit of the testator's estate that any and what parts of his property should be sold or mortgaged for the purposes of rebuilding, repairs, renewals of leases, or otherwise for the purposes of his will. A receiver was also appointed. On the 2nd of April, 1832, the Master reported that he approved a proposal which had been laid before him that the trustees should by sale or mortgage of the estate raise a sum of £3262 18s. for the purpose of paying debts, legacies, and costs, apprenticing one of the infants, repairs, and surrendering some of the leases. The sums proposed to be paid for the surrenders amounted to £1500 and for repairs to £500.

By the order on further directions on

[KAY, J.:—Was there no power of sale in the will there?]

Only as to the residue, which was given on trust for sale and conversion.

Charles Church, for the Defendants.

KAY, J.:—

I will now direct an inquiry whether any and what repairs of houses which are part of the infant's property are absolutely necessary to be done. I think that this jurisdiction should be jealously exercised, and only in cases which amount to actual salvage. Any of the parties will have liberty to apply in Chambers as to raising such sums as may be required for the doing of any repairs which may be certified to be absolutely necessary.

Solicitors for all parties: *Thomas White & Sons*, agents for *William Morgan, Stafford.*

---

the 30th of May, 1832, the Master's report was approved and ordered to be carried into effect. On the 16th of March, 1833, the Master made another report, stating that the Plaintiffs had submitted that they had not carried into effect the direction to surrender a part of the leasehold property, known as *Spread Eagle Court*, for the surrender of which the sum of £1050 was to be paid, because they had been advised that it would not be for the benefit of the testator's estate to do so, and they proposed instead to rebuild and repair those houses at a cost of £1000. The Master approved this proposal and also another proposal that the sum to be raised by a mortgage of the whole of the testator's freehold and leasehold estate should be £3500 instead of £3262 18*s.* On the 25th of March, 1833, an order was made approving this report and directing the Plaintiffs to raise the £3500 by a mortgage, which was to be settled by the Master. The money was ordered to be paid into Court, and after payment of the taxed costs the balance was ordered to be paid to the receiver, who was directed to contract for the repairs, to pay certain costs and debts, and to apply the residue of the £3500 for the purposes mentioned in the report.

W. L. C.

KAY, J.

1882

July 10.

MARSHALL *v.* GINGELL.

[1882 M. 1662.]

Will—Construction—Devise to Trustees—Extent of Estate—Direction to pay Debts—Contingent Remainder—Failure of particular Estate.

A testator, by his will made in 1838, directed his debts to be paid. And he devised specific real estate to four persons (whom he afterwards named as his executors), their heirs and assigns, upon trust and for the intents and purposes thereinafter mentioned, viz., upon trust during the minority of his daughter *D.* to receive the rents and apply the same for her benefit till she should attain twenty-one, and, on her attaining twenty-one, to pay to or permit and suffer her to receive the rents during her life for her separate use, without power of anticipation. And, from and after her death, upon trust for, and the testator thereby gave and devised the property to the issue children or child of the daughter who should live to attain twenty-one, in equal shares, if more than one, and to their respective heirs and assigns, with remainders over. And, after making other specific devises and bequests, the testator devised and bequeathed the residue of his estate and effects (subject to and charged with the payment of his debts) to one of his trustees absolutely, for his own use and benefit. The daughter *D.* survived the testator, and she afterwards married and had three children, but she died before any of them had attained twenty-one:—

Held, that, by reason of the direction that the testator's debts should be paid, the trustees took the whole legal estate in fee simple in the specifically devised estate, and consequently that the contingent remainder to the children of the daughter had not failed by reason of the determination of her life estate before the happening of the contingency.

Festing v. *Allen* (1) distinguished.

Creaton v. *Creaton* (2) followed.

DEMURRER.

John Gingell, by his will dated the 19th of October, 1838, directed his just debts, funeral expenses, the charges of proving his will, and other incidental disbursements to be paid. And he gave and devised to his son *James Gingell*, *J. H. Giles*, his nephew *George Gingell*, and *P. W. Carter*, a farm called *Churches*, To hold the same unto *James Gingell*, *Giles*, *George Gingell*, and *Carter*, their heirs and assigns, "Upon the trusts and for the intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same (that is to say), upon trust

(1) 12 M. & W. 279. (2) 3 Sm. & Giff. 386.

that they my said trustees, or the survivor of them, his heirs or assigns, do and shall, during the minority of my daughter *Dinah Alice Gingell*, receive and take the rents and profits thereof, and apply the same for the use and benefit of my said daughter till she shall attain the age of twenty-one years, and, upon my said daughter attaining the said age of twenty-one years, pay to or permit and suffer her to have, receive, and take the rents, issues, and profits of the said farm for and during the term of her natural life, to and for her own sole and separate use and benefit," without power of anticipation. "And from and after the decease of the said *Dinah A. Gingell*, upon trust for, and I do hereby give and devise the said farm unto all and every the lawful issue, children or child of my said daughter, who shall live to attain the age of twenty-one years, equally to be divided between them, if more than one, share and share alike, as tenants in common and not as joint tenants, and to their respective heirs and assigns for ever, and if there shall be but one such child, then the whole to and for such only one upon attaining the said age, his or her heirs and assigns for ever. And in case there shall be no such child of my said daughter, or, being such issue child or children all of them shall die under the said age of twenty-one years, then upon trust, and I do hereby give, devise, and bequeath the said farm unto my said son *James Gingell* and my daughter *Sarah C. B. Gingell*, equally to be divided between them, share and share alike, as tenants in common and not as joint tenants, and to their heirs and assigns for ever." The testator then devised another farm to the same trustees in similar terms, upon trust for his daughter *Sarah C. B. Gingell* for her life, with remainder to her issue, and with ultimate remainders to his son *James Gingell* and his daughter *Dinah A. Gingell* in equal shares. And, after a bequest of a sum of £1400 to his trustees, upon certain trusts for the benefit of his daughter *Sarah C. B. Gingell* and her issue, with remainder, in the event of her having no issue who should live to attain twenty-one, unto the testator's son *James* and daughter *Dinah* in equal shares, and some other specific devises and bequests there came the following clause: "And as to all sum and sums of money due and owing to me on mortgage bonds or other securities, ready money, and outstanding debts, and all

KAY, J.
1882
MARSHALL v. GINGELL.

the rest, residue and remainder of my estate and effects, whatsoever and wheresoever, and of what nature or kind soever the same shall or may consist of, whereof I shall die possessed or entitled to, not hereinbefore specifically disposed of, I do hereby give and bequeath the same (subject to and charged and chargeable with the payment of my just debts, funeral expenses, and the charges of proving this my will) unto my said son *James Gingell*, To hold to him, his heirs, executors, administrators, and assigns for ever, or for all my term and interest therein, to and for his and their own purposes, use, and benefit absolutely." And the testator appointed the four persons whom he had named as trustees to be "joint executors in trust" of his will.

The testator died on the 25th of November, 1838. His daughter *Dinah*, in the year 1857, married *R. P. Marshall*, and she died on the 22nd of August, 1864. She had three children, viz., *Sarah G. Marshall*, born on the 17th of November, 1859; *Purvis S. Marshall*, born on the 21st of May, 1861, and *James Marshall* (the Plaintiff), born on the 16th of December, 1862, and they all survived her. During her life she received the rents of the farm devised by the testator for the benefit of herself and her children, and after her death the rents were received by *James Gingell*, who from time to time applied them for the benefit of her children.

The writ in this action was issued on the 2nd of May, 1882, in the name of *James Marshall*, by a next friend, as Plaintiff, against the trustees of the will, and *Sarah G. Marshall* and *Purvis S. Marshall* as Defendants.

The Plaintiff claimed a declaration that each of the Defendants *Sarah G. Marshall* and *Purvis S. Marshall* was absolutely entitled to one equal third part of the farm called *Churches*, and that the Plaintiff was also entitled, contingently on his attaining the age of twenty-one years, to the remaining equal third part of the same farm; an account of the rents and profits come to the hands of the Defendants the trustees as trustees or bailiffs for the Plaintiff and the other Defendants; and the appointment of a receiver.

The trustees demurred to the statement of claim, on the ground that the gifts to the children of the testator's daughter *Dinah* were contingent remainders, which had failed by reason of her

having died before the Plaintiff or any other child of hers had attained the age of twenty-one.

Glasse, Q.C., and *Methold*, for the trustees:—

The devise to the issue of the testator's daughter *Dinah* is a legal devise, and it is contingent on their attaining twenty-one. It has failed by reason of their mother having died before any of them had attained twenty-one: *Festing* v. *Allen* (1). In *Astley* v. *Micklethwait* (2) Vice-Chancellor *Malins*, though he expressed his dissent from *Festing* v. *Allen*, said (3) that it had become binding authority on him.

J. Pearson, Q.C., and *G. C. Price*, for the Plaintiff:—

The rule laid down in *Festing* v. *Allen* often acts very harshly, and it has been doubted by many Judges, *e.g.* by Lord *Hatherley* in *In re Mid Kent Railway Act* (4). There are many decisions inconsistent with *Festing* v. *Allen*; *Riley* v. *Garnett* (5); *Berry* v. *Berry* (6); *Harton* v. *Harton* (7); *Brown* v. *Whiteway* (8).

[KAY, J., referred to *In re Eddel's Trusts* (9); *In re Lechmere & Lloyd* (10).]

But the present case is distinguishable from *Festing* v. *Allen*. The direction to pay the testator's debts is sufficient to shew that the testator intended that the trustees (who were also executors) should take the whole legal fee: *Creaton* v. *Creaton* (11); *Spence* v. *Spence* (12).

[KAY, J., referred to *Finch* v. *Hattersley* (13).]

Glasse, in reply:—

Festing v. *Allen* is almost identical with this case: *Doe* v. *Biggs* (14). The direction to pay debts makes no difference: *Doe* v. *Claridge* (15). *Creaton* v. *Creaton* has never been followed

(1) 12 M. & W. 279.
(2) 15 Ch. D. 59.
(3) Ibid. 64.
(4) Joh. 387, 396.
(5) 3 De G. & Sm. 629.
(6) 7 Ch. D. 657.
(7) 7 T. R. 652.
(8) 8 Hare, 145.
(9) Law Rep. 11 Eq. 559.
(10) 18 Ch. D. 524.
(11) 3 Sm. & Giff. 386.
(12) 12 C. B. (N.S.) 199.
(13) 3 Russ, 345, n.
(14) 2 Taunt. 109.
(15) 6 C. B. 641.

KAY, J.
1882
MARSHALL
v.
GINGELL.

in any reported case. There is a mere charge of debts. The only purpose for which the trustees must necessarily interfere would be satisfied by an estate *pur autre vie*, and a mere charge of debts will not enlarge that estate into a fee.

Moreover, there is a devise of residue to the testator's son *James*, charged with the payment of the testator's debts.

KAY, J.:—

This case came on by way of demurrer to the statement of claim, but I have the permission of the parties to look at the will itself. All the parties desire to have my decision on the construction of the will; and the demurrer was put in by arrangement. [His Lordship read the above stated provisions of the will, and continued:—] The question is whether, there being a devise of a specific estate in the first instance to trustees in fee, upon trust for the testator's daughter *Dinah* for her life, and then after her death a devise of the estate to her "lawful issue, children or child," who should attain twenty-one, in equal shares as tenants in common, and to their respective heirs and assigns, that gift to her issue and children comes within the doctrine of *Festing* v. *Allen* (1). I can see no difference between the words of the gifts in the two cases, and therefore, if the devise is a legal one, the gifts to the issue and children will be legal contingent remainders, and, consequently, as none of the children attained twenty-one during the lifetime of their mother, the contingent remainders have failed. If, however, the trustees take the legal estate in fee simple, their legal estate will support the contingent remainders. The question, therefore, is, what is the true construction of the will in this respect. The words of the will are large enough to convey to the trustees an absolute estate in fee simple, and the question, whether they take an estate in fee simple or not, must be determined on looking at the whole will, in order to see whether the purposes of the will are such as to require that they should take an estate in fee simple. The words of the gift to the issue and children are "I give and devise." If these words give the legal fee, the estate of the trustees would last only during the life of the mother. It is possible to read the words in

(1) 12 M. & W. 279.

this way. But, on the other hand, if the purposes of the will are such as to require that the trustees should take an estate which would endure beyond the life of the mother, the words are equally capable of that construction. In that case, the words "I give and devise" would operate to give only an equitable interest to the issue and children. The question is, whether the direction to pay the testator's debts, coupled with the devise to trustees who are also named as executors, gives them the legal estate in fee. If the testator had directed that his debts should be paid by his trustees, or by his trustees and executors, there is plain authority for holding that those words would be sufficient to give the trustees the legal fee in the real estate devised to them. This question came before the Court of Appeal in the recent case of of *In re Tanqueray-Willaume & Landau* (1). Then there is the case of *Spence* v. *Spence* (2), in which the words were, "I direct my just debts to be paid by my executors hereinafter named, as soon as conveniently may be after my decease." And then the testator devised all his real estate to trustees, whom he afterwards appointed executors, on trust to pay the rents to his son for his life, and, from and after the death of the son, in trust for the right heirs of the son for ever. And it was held that, by reason of the direction to the executors to pay the testator's debts, the trustees took the legal estate in fee, and that, by the operation of the rule in *Shelley's Case* (3), the son took an equitable estate in fee. The direction to the executors to pay the debts was held to be sufficient evidence of the intention of the testator to give the trustees such an estate as would enable them to pay the debts by selling or mortgaging the estate. There the direction was that the debts should be paid by the executors; in the present case it is only "I direct my debts to be paid." But in *Creaton* v. *Creaton* (4) there was a similar direction that the testator's debts should be paid, without saying by whom, and then a devise of real estate to trustees, who were also named executors, upon trust to pay the rents to the testator's two daughters, in equal moieties, during their lives, and to pay the whole to the survivor of the daughters during her life, and then the testator devised the estate in equal moieties

(1) 20 Ch. D. 465.
(2) 12 C. B. (N.S.) 199.
(3) 1 Co. Rep. 93 b.
(4) 3 Sm. & Giff. 386.

KAY, J.
1882
MARSHALL
v.
GINGELL.

to the heirs of the body of each of the daughters, with an ultimate remainder to the right heirs of the surviving daughter. There, Vice-Chancellor *Stuart*, on a consideration of the authorities which were cited to him, including *Kenrick* v. *Lord W. Beauclerk* (1), held that the direction to pay debts, though it was not in terms a direction that they should be paid by the executors, was still enough to justify him in deciding that it was the intention of the testator that the trustees should take such an estate as would enable them to pay his debts out of the property devised to them, and accordingly the Vice-Chancellor held that the fee simple passed to the trustees. Mr. *Vaughan Hawkins*, in his valuable work on the Construction of Wills, says (2), "It may be considered as settled, that, in wills made as well before as since 1838, a devise to trustees in trust to pay the testator's debts vests in them the absolute legal fee. But, on the other hand, a mere charge of debts on the lands devised, the trustees not being directed to pay the debts, does not enlarge the estate of the trustees." He then refers to *Kenrick* v. *Lord W. Beauclerk*, and to *Spence* v. *Spence* (3), and goes on, "the strongest case, however, on this point is *Creaton* v. *Creaton* (4), where it was held that, under a devise to trustees in trust to pay the rents to *A.* for life, with remainder in trust for *B.* in fee, a direction that the testator's debts should be paid (without saying by whom) at the beginning of the will, the trustees being also executors, was sufficient to vest in the trustees the whole legal fee." Mr. *Hawkins* treats that case, and I believe quite rightly, as being the strongest case on the subject, because, though there was a direction that the testator's debts should be paid, it was not said by whom they were to be paid. However, I find that case, and I think the Court is bound to look anxiously for any indication of intention which will enable it to hold that the devises to the issue of the daughter do not fail by reason of the very technical rule of our law as to contingent remainders. I am unable to find any distinction between the present case and *Creaton* v. *Creaton*, unless it be in the fact that here there is a devise of residue to one of the testator's sons charged with the payment of debts. That, however, does not exclude the construc-

(1) 3 B. & P. 175.
(2) Page 151.
(3) 12 C. B. (N.S.) 199.
(4) 3 Sm. & Giff. 386.

tion that the testator intended to charge with the payment of his debts, not merely the residue, but also the estate which he specifically devised. If he did not, what would be the use of the direction at the beginning of the will that his debts should be paid? It would be a merely useless direction without any operation at all. I cannot so read the will. It seems to me that this direction can have no other purpose than to charge the property which the testator devised specifically with the payment of his debts. I think that conclusion is strengthened rather than weakened by the gift of the residue, which is given, not to all the executors, but to one executor for his own benefit. The estate which is specifically devised, is given to the executors whose duty it would be to pay the testator's debts. I read the direction to pay debts almost as if it had been an express direction that the executors should pay the debts, and, if so, the case comes within *Spence* v. *Spence* (1), as well as within *Creaton* v. *Creaton* (2). Seeing that the first words of gift are quite sufficient to pass the legal estate in fee to the trustees, and that the only indication of a contrary intention is in the words of the devise to the issue of the daughter, I think that the indication of an intention that the trustees should take the legal fee, which is to be found in the direction to pay the testator's debts, is enough to justify me in holding, as was held in *Creaton* v. *Creaton*, that the executors were to pay the debts, and the words of gift being sufficient to give the legal fee, I think I may read them as giving the trustees, not merely an estate *pur autre vie*, but an estate in fee simple. Consequently, the doctrine of *Festing* v. *Allen* (3) does not apply, and the demurrer must be overruled.

Solicitors for all parties: *Thomas Baddeley & Sons.*

(1) 12 C. B. (N.S.) 199. (2) 3 Sm. & Giff. 386.
(3) 12 M. & W. 279.

W. L. C.

KAY, J.
1882
July 12.

HILL *v.* HART DAVIES.

[1882 H. 2755.]

Injunction—Libel—Privilege—Friendly Society—38 & 39 *Vict. c.* 60, *s.* 23.

An injunction can be granted to restrain a libel likely to injure a friendly society or joint stock company.

A member of a friendly society issued to persons not members of the society circulars containing inaccurate statements as to the financial condition of the society:—

Held, that such circulars ought to be restrained by injunction.

THIS was a motion on behalf of the trustees of the *Independent Mutual Brethren Friendly Society* to restrain the publication of a libel. The society was registered under the *Friendly Societies Act*, 1875, and under that Act was subject to a quinquennial valuation of its financial condition. On the 31st of December, 1880, the society's first quinquennial valuation was made, the result shewing an estimated deficiency of £147,325. But it appeared from the affidavit of the general secretary, and the Court was satisfied upon the evidence, that since the date of the quinquennial report the society had taken successful steps to place their funds on a better footing.

The Defendant, an honorary member of the society, issued a circular to the clergy of several parishes where the society had branches, in which he stated: first, that while the society had been in existence its total available funds were less than £7000; secondly, that it had an estimated actuarial deficiency of £147,000; thirdly, that the management fund was largely indebted to the benefit fund.

The Plaintiffs complained that the Defendant circulated these statements throughout the country which represented a state of things which, though true in December, 1880, was false when the Defendant issued the circular in June, 1882, and that unless the Defendant was restrained from continuing to issue the circular great and irreparable injury would be caused to the society.

In his affidavit the Defendant stated that a great many of his poor parishioners were members of the society, and he took an

interest in its position on their account. On discovering the position of the society and that it could bring (with few exceptions) nothing but ruin upon his parishioners, he felt it his duty to press for an investigation, and with that view he had issued the circular.

Cookson, Q.C., and *Colquhoun*, for the motion :—

This libel ought to be restrained whatever may be the motive of the Defendant.

[KAY, J., referred to *Thorley's Cattle Food Company* v. *Massam* (1).]

Prudential Assurance Company v. *Knott* (2) is no longer law: *Thomas* v. *Williams* (3); *Beddow* v. *Beddow* (4).

J. Pearson, Q.C., and *Northmore Lawrence*, for the Defendant :—

The substance of the circular is true although some of the figures have changed since December, 1880. There is no reason why if a member wants to get the support of a sufficient number so as to obtain an inquiry he should not be at liberty to issue such a letter in order to obtain that support. At the time Mr. *Davies* issued the circular he believed the statements to be correct; he had no malicious motive.

[The learned Judge suggested that an undertaking not to continue to issue the circular should be given, but the Defendant preferred that an order should be made.]

KAY, J. :—

This motion seeks to restrain the Defendant from issuing a certain circular concerning the society. I assume that he is a member of the society. I assume that his object in issuing the circular was to obtain that kind of valuation and estimate of the position of the society which may be obtained under the 38 & 39 Vict. c. 60, s. 23; and I assume (and I confess I think it would be so) that if he were to issue a circular for that purpose for distribution among the members containing no inaccurate statement

(1) 6 Ch. D. 582.
(2) Law Rep. 10 Ch. 142.
(3) 14 Ch. D. 864.
(4) 9 Ch. D. 89.

KAY, J. 1882 HILL v. HART DAVIES.

as to the position of the society he would be acting perfectly within his rights, and the Court would not restrain him. The purpose of issuing this circular is plain. It is to obtain a sufficient number of signatures of members through the agency of clergymen of different parishes of *England* to enable the writer to get the Chief Registrar to make an investigation under the section of the statute to which I have referred. The purpose is quite a proper one. The letter is not otherwise than proper except in this respect, that some of the statements are statements not based upon any examniation of the actual position of the society, of which it is not pretended this gentleman has any knowledge, but they are statements which are based upon the last quinquennial report, which stated what was the condition of the society in December, 1880, and upon the evidence before me, as I have already said, these statements are not accurate as applied to the condition of the society at the present time.

Now the law is beyond all question. Supposing that this gentleman is entirely in order and regular and within the law as to privilege in writing to his brother members of the society; first of all I observe that this circular is not addressed to the members of this society, it is addressed to clergymen of different parishes in *England*, who may not be members of this society; in the second place, I cannot find the least warrant for making these statements as representing the actual condition of the society at this time.

The evidence before me shews that the condition of the society is not worse, but that it is better than in 1880, and if this gentleman were to go on issuing this circular after the knowledge as to the position of the society which he has now acquired he would be doing that which the law condemns. He would undoubtedly be libelling this society, and whether he accomplished his object of having a meeting or not, he would most seriously damage the society itself by the means which he is taking for a different purpose. As to the law, I have no doubt whatever about it. It seems to me that it is perfectly settled that any libel which is calculated to injure another man in his trade, or a trading company, will be restrained by injunction, and although there has been, it is said, no reported case which applies that law and

practice to a friendly society or joint stock company, I have not the least doubt that it is as applicable to the case of a friendly society or joint stock company as it is to an individual trader, because everybody who has the least knowledge of what goes on in the world, and particularly of what goes on in Courts of Justice, must be perfectly well aware that nothing is more sensitive to evil report and to false statements than a society like a friendly society or a joint stock company, and if a libel against an individual trader which may injure him in his business can be and ought to be restrained by injunction, then it seems to me *à fortiori* that a libel likely to injure a society like this in its business should also be restrained by injunction.

In what I have said, I have given credit to this gentleman for perfectly legitimate motives in all he did up to the commencement of this action, but if he were now to go on issuing this circular, containing statements which are now proved to my satisfaction, in his presence, to be false, he would be doing that which the Courts always consider takes any communication out of the region of privilege. I will read from the edition of *Addison* on Torts, recently edited by Mr. Justice *Cave*. It is there stated, "Whether the circumstances under which a communication was made constitute it a privileged communication or not is a question which the Court has assumed the jurisdiction of determining, but if there is any dispute about those circumstances the question must be submitted to a jury. It is essential to the existence of the privilege and protection that the communication, under whatever circumstances made, should be believed to be true by the party making it; for a person cannot shelter himself under the privilege if he believes the charge imputed untrue unless he at the same time declares his belief in its untruth. If a man knowingly make a false charge there is at once actual malice and the privilege is blown to the winds." (1). I adopt that statement and concur in it entirely, and if this gentleman were to go on publishing this circular after the knowledge which he and I have both acquired by what has taken place in Court, he would come within the sentence which I last read, and he would be guilty of actual malice, and the privilege could not possibly exist. I have,

(1) Addison on Torts, 5th Ed. p. 166.

KAY, J. 1882 HILL v. HART DAVIES.

therefore, no hesitation in saying that I consider it the duty of the Court (and I am sorry he has thrown this duty upon me by refusing to give an undertaking) to grant an injunction restraining the further issuing of this circular, and I shall add these words, "or any other circular or letter containing false or inaccurate representations as to the credit or financial condition of the said society."

Solicitors: *Montagu Scott & Baker; Poole, Hughes, & Co.*

C. W. C.

KAY, J. 1882 *July* 12.

GRAY *v.* WEBB.

[1882 G. 999.]

Practice—Pleading—Counter-claim—Rules of Court, 1875, *Order* XIX., *r.* 3; *Order* XXII. *r.* 9; *Order* XXVII., *r.* 1.

Order XIX., r. 3, is sufficiently general to allow a counter-claim by way of defence whether or not it is connected with or of the same character as the plaintiff's claim, and whether it sounds in damages or not.

But the Court has a discretion to exclude a counter-claim which may unduly delay the action.

THE Plaintiff in this action sought the specific performance of an agreement dated the 5th of March, 1880, by which the Defendant agreed to purchase certain land in *Lincolnshire*, and he claimed payment of the purchase-money with interest amounting to £1400.

The Defendant put in a defence and a counter-claim, in the latter of which he stated various commercial dealings between himself and the Plaintiff connected with a purchase and sale of a drapery business and stock, as a result of which he claimed that the Plaintiff was indebted to him in the sum of £252 2*s.* 5*d.*, and he asked that the specific performance prayed by the Plaintiff might not be decreed without taking into account this sum of £252 2*s.* 5*d.* by way of set-off, and he prayed for an account to be taken if necessary.

The Plaintiff called for particulars of the £252 2*s.* 5*d.* which the Defendant asked to set off against the purchase-money.

The Defendant delivered particulars consisting of a considerable number of items.

This was a motion to strike out the counter-claim.

Glasse, Q.C., and *Nalder*, for the Plaintiff:—

The counter-claim ought to be struck out under the discretion given to the Court by Order XXII., rule 9: *Padwick* v. *Scott* (1); *Pellas* v. *Neptune Marine Insurance Company* (2).

Bardswell, for the Defendant:—

The counter-claim is sufficiently connected with the Plaintiff's claim: *Macdonald* v. *Carington* (3); *Beddall* v. *Maitland* (4).

KAY, J.:—

It seems to me plain that the words of Order XIX., rule 3, are sufficiently wide to give the Court jurisdiction to admit this counter-claim.

Order XIX., rule 3, is as follows: "A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim. But the Court or a Judge may on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set-off or counter-claim cannot be conveniently disposed of in the pending action or ought not to be allowed, refuse permission to the defendant to avail himself thereof." Vice-Chancellor *Hall*, in commenting on this rule in the case of *Padwick* v. *Scott* (5), says, "Admitting that the rule may embrace cases of a different character, the set-off is to 'have the same effect as a statement of claim in a cross action so as to enable the Court to pronounce a final judgment in the same action,' and it must be a cross action

(1) 2 Ch. D. 736.
(2) 28 W. R. 405.
(3) 4 C. P. D. 28.
(4) 17 Ch. D. 174.
(5) 2 Ch. D. 744.

KAY, J. 1882 GRAY v. WEBB.

of a nature connected with the particular original cause of action so as to be capable of being fairly and reasonably dealt with by way of set-off or counter-claim therein."

In *Pellas* v. *Neptune Marine Insurance Company* Lord Justice *Bramwell* said (1) "the argument for the defendants was that whatever was a defence to a liquidated claim has been made by Order XIX., rule 3, a defence to an unliquidated claim. I cannot assent to that argument; according to it, if *A.* sues *B.* for damages for breaking his leg, *B.* may set up as a defence a claim against *A.* as the acceptor of a bill of exchange, is it possible to say that that can be deemed 'a defence'?" So that Lord Justice *Bramwell's* language points to this, that the counter-claim must be something in the nature of a defence.

In *Macdonald* v. *Carington* (2) Lord Justice *Lindley*, commenting on Order XIX., rule 3, says, "Reading that (the rule) without the context or other sections or the light of authorities, I should understand that the defendant in any action might set off or set up by way of counter-claim, any claim against the plaintiff in the same character in which he sues himself and the proviso to the section confirms that view." From these authorities I do not think that the opinion of learned Judges on the question are quite in accord. In *Beddall* v. *Maitland* (3) Mr. Justice *Fry*, taking a view like that of Lord Justice *Lindley*, says, "It is to my mind evident that there is no intention to confine the claim made by the counter-claimant to damages or to an action of the same nature as the original action; and therefore when it is said that the defendant may set up against the claim of the plaintiff a claim of his own it does not necessarily mean that the claims are to be *ejusdem generis*, because it says expressly 'whether such counter-claim sound in damages or not.'"

In that state of the authorities I think that I may, without presumption, venture to decide this case on my own opinion. The terms of Order XIX., rule 3, are, as I have already intimated, large enough to allow a counter-claim to include any case raised by way of defence, whether it is or is not connected with or of the same character as the plaintiff's claim, and whether it sounds

(1) 28 W. R. 406. (2) 4 C. P. D. 28, 38.
(3) 17 Ch. D. 174, 181.

in damages or not. Nor does it appear that any practical inconvenience can arise from giving a wide interpretation to this rule, because beside the discretion given by the rule itself it ought to be read in conjunction with Order XXII., rule 9, which provides "where a defendant by his statement of defence sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent action, he may at any time before reply apply to the Court or a Judge for an order that such counter-claim be excluded, and the Court or a Judge may on the hearing of such application make such order as shall be just."

The language of that order seems to confirm my view that Order XIX., rule 3, has a wide signification sufficient to include all that I have said that it includes. But Order XXII., rule 9, which gives the Court a discretion, is not the only rule that applies to the case. By Order XXVII., rule 1, "the Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in a statement of defence which may tend to prejudice, embarrass, or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purposes of determining the real questions or question in controversy between the parties."

Reading all these rules together I think that it is expedient to give a wide interpretation to Order XIX., rule 3, but by that and the other rules power is reserved to the Court to strike out any counter-claim which may be inconvenient, for example, such counter-claim as might cause an undue delay in the trial of the action.

In the present case the Defendant is in possession as purchaser of freehold land from the Plaintiff who asks for the specific performance of the contract. That is practically a claim for money now due, and to this action there is really no defence. The Defendant put in a counter-claim which was delivered on the 27th of May, 1882, and it alleges that in July, 1878, the Plaintiff carried on the business of a draper and agreed to sell to the Defendant his stock-in-trade, book-debts, and goodwill, and undertook to repay the amount if the book-debts got in should fall

KAY, J.
1882
GRAY
v.
WEBB.

short of £300, and that a sum of £252 is payable under that agreement. The Plaintiff asked for particulars of the counter-claim, which the Defendant has delivered. These particulars consist of a long statement of account. It must take a considerable time to verify these particulars of the counter-claim, and the sum claimed by the Plaintiff is £1400 while the Defendant by his counter-claim only claims £250. Now, under these circumstances, is it expedient, is it convenient that the trial of this action should be delayed by this counter-claim? It seems to me that it is not expedient, and I shall order the counter-claim to be excluded without prejudice to any action, but all costs already occasioned by the counter-claim must be reserved until the trial of the action.

Solicitors: *Toynbee; Collyer-Bristow & Co.*

C. W. C.

KAY, J.
1882
July 17.

In re KNOWLES.
NOTTAGE *v.* BUXTON.

[1880 K. 0229.]

Will—Construction—Portions—Period of Vesting—Gift to Class of Children—Variation between Words of Gift and Words of Gift over.

The rule that the Court will lean to a construction which will give portions to all of a class of children who may live to require them is not confined to settlements, but extends also to wills.

Jackson v. *Dover* (1) followed.

ADJOURNED SUMMONS.

This action was brought for the ascertainment of the persons respectively interested in certain properties devised by the will and codicil of *Henry Knowles*, who died in October, 1802, and for the sale and division of the proceeds, or for the partition thereof.

The question raised by the summons arose on the construction of the will of *Mary Still*, a daughter of *Henry Knowles*, to whom he had devised some of his real estate.

(1) 2 H. & M. 209. 16 Jur. N.S. 681

Mary Still by her will, dated the 18th of May, 1850, and made in exercise of certain powers vested in her, gave the real estates devised to her by her father to her husband, in trust nevertheless to let on lease or otherwise, and to pay the profits, after necessary repairs and outgoings, to her three daughters when, how, and in such proportions as he might deem proper to each so to do, and on his decease she gave all her said estates to her daughters *Emma Francis Nottage* and *Eliza Hodgson*, in trust nevertheless that the rents and profits only thereof should be divided equally among her three daughters, share and share alike, as tenants in common, for respectively their own sole and separate use. "And at the decease of either of my daughters I direct my executors and trustees to apply the deceased's portion or share of the said rents and profits to the education and support of the child or children of the deceased parent who may be living at their mother's decease until they become twenty-one years of age, then they will be entitled to their mother's portion, and if the children or child die (if but one) before they become of that age, then I bequeath their mother's portion of these rents and profits of my estates to my other daughters on the terms of my bequest to them respectively as well as for their own sole and separate use."

Mary Still died on the 15th of April, 1853. Her daughter *Mary Hill* (then a widow) was one of the Plaintiffs in the action. She afterwards died on the 29th of March, 1882. She had only one child, a son, *Abram Hill*. He attained twenty-one and died on the 18th of April, 1863, intestate, leaving a son, *Henry Dawson Hill*, his heir-at-law.

The question raised by the summons was, whether under the will of *Mary Still* the share of her daughter *Mary Hill* vested in her only son *Abram Hill* on his attaining twenty-one, and therefore passed to his heir-at-law, or whether, as no child of *Mary Hill* had survived her, the gift over took effect.

Levett, for the heir-at-law of *Abram Hill*:—

The Court always leans to a vesting at twenty-one, especially when there is, as here, an inconsistency between the words of the original gift and those of the gift over: *Perfect* v. *Lord Curzon* (1);

(1) 5 Madd. 442.

KAY, J.
1882
In re KNOWLES.
NOTTAGE *v.* BUXTON.

Torres v. *Franco* (1); *Dixon* v. *Barkshire* (2); *Theobald* on Wills (3). These were cases of settlements, but the same principle applies to the construction of wills: *Hallifax* v. *Wilson* (4).

[KAY, J., referred to *Swallow* v. *Binns* (5).]

Procter, for the Plaintiffs:—

All the cases referred to, except *Hallifax* v. *Wilson*, were cases of settlements, in which of course there is a presumption of an intention to make a provision for children who attain twenty-one. In *Hallifax* v. *Wilson*, Sir *William Grant* only said (6) that the reasoning upon which the cases cited to him proceeded "must be just as applicable to wills as to settlements, supposing the object to be similar." *Swallow* v. *Binns* is distinguishable.

[KAY, J., referred to *Jackson* v. *Dover* (7).]

Jolliffe, for the Defendants.

Levett, in reply.

KAY, J.:—

This summons raises a question which has been very often discussed, but more often upon limitations contained in settlements than upon limitations contained in wills. [His Lordship referred to the provisions of the will, and continued:—] The question is whether under these words it is essential that the children of *Mary Hill*, in order to take under the gift of her share, should have been living at the time of her death. But for the words of the gift over the Court might be free to come to that conclusion. The trust to apply the deceased parent's share of the rents to the education and support of her children is clearly a trust for the benefit of those children who may be living at their mother's decease, and then the testatrix goes on to say that those children will when they become twenty-one be entitled to their mother's

(1) 1 Russ. & My. 649.
(2) 34 Beav. 537.
(3) 2nd Ed. p. 420.
(4) 16 Ves. 168.
(5) 1 K. & J. 417.
(6) 16 Ves. 172.
(7) 2 H. & M. 209.

portion. But the gift over is not in terms limited to the death before twenty-one of the children who should survive their mother; it does not say "if such children or child die," but "if the children or child die before they become of that age." I must construe these words as applying to all the children of the parent, otherwise I must attribute to the testatrix the almost inconceivable intention of giving the whole share to the children who should survive the mother, although there were other children who attained twenty-one and died before the mother, and yet of giving the share away altogether if no child of those who might survive the mother should attain twenty-one. I should decline to attribute such an intention unless the words were quite plain. Looking back then to the case of *Perfect* v. *Lord Curzon* (1), I find that Vice-Chancellor Sir *J. Leach* said (2): "In this settlement the clauses of gift to the children are clearly and unambiguously expressed. There is clearly no direct gift to any child who is not living at the death of the survivor of the parents. If it were equally clearly and unambiguously expressed, that the gifts over were to take effect in every event, unless some child survived both parents, there would be no ground for acting upon any presumed intention in favour of the children, and the clear expressed intention must prevail." The Vice-Chancellor then examined the terms of the gift over, and he concluded by saying (3): "Upon the whole, therefore, although in the clauses of gift to the children there is clearly no direct gift to any child who does not survive both parents, yet in the clauses of gift over upon failure of the children it is, to say the least of it, not clearly and unambiguously expressed that the gifts over are to take effect in every event unless some child should survive both parents. I am bound, therefore, by the authorities to say that the presumed intention in favour of the children must prevail here; and that the daughter who attained twenty-one, and who happened also to marry, and afterwards died in the lifetime of one of her parents, took a vested interest, to which the Plaintiffs are now entitled." That case has been followed in many other cases of settlements. But it has been argued that the doctrine which is established by that class of cases is

(1) 5 Madd. 442.
(2) 5 Madd. 445.
(3) 5 Madd. 447.

KAY, J.
1882
In re KNOWLES NOTTAGE *v.* BUXTON.

confined to settlements and does not extend to wills. I find, however, that Lord *Hatherley* when Vice-Chancellor held very distinctly in *Jackson* v. *Dover* (1), that the rule is not confined to settlements, but that it extends also to wills. There the gift in question was a gift of residue by will. I refer to that case, not because the language used by the testatrix there was precisely similar to that of the testatrix in the present case, but because Lord *Hatherley*, after an examination of the authorities, came to the conclusion which I have mentioned. He said (2): "I am satisfied that the rule is not limited to settlements, but applies equally to wills in which the testator makes a provision for a class of children." In the present case the only child of *Mary Hill* attained twenty-one and died in her lifetime, and the question is whether he took a vested interest in her share. I think upon the authorities, such as *Torres* v. *Franco* (3) and *Swallow* v. *Binns* (4), coupled with *Jackson* v. *Dover*, which applies the doctrine to wills, that I am justified in holding that the child of *Mary Hill* took a vested interest in her share when he attained twenty-one, and consequently that his heir-at-law is now entitled to it.

Solicitors for all parties: *Bower, Cotton, & Bower.*

(1) 2 H. & M. 209. 10 Jur. N.S. 631
(2) Ibid. 215.
(3) 1 Russ. & My. 649.
(4) 1 K. & J. 417. 1 Jur. N.S. 843

W. L. C.

Considered. McDONNELL v. NEIL [1951] A. C. 342

In re HUTCHINSON'S TRUSTS.

KAY, J.
1882
July 21.

Will—Construction—Bequest to F. H. S. and R. S. share and share alike, "and after the decease of the said F. H. S. and R. S. to their Children share and share alike, and to their Heirs for ever."

A testatrix bequeathed personalty in trust for *A. B.* for life, and after his decease for his issue, and on failure of his issue to *F. H. S.* and *R. S.* share and share alike, "and after the decease of the said *F. H. S.* and *R. S.* to their children share and share alike, and to their heirs for ever."

F. H. S. died without having had issue, *R. S.* survived him and died leaving children, and *A. B.*, who survived them both, died without issue.

Upon a petition by the children of *R. S.* for payment out of a portion of the trust fund which was in Court:—

Held, that, upon the authorities, the bequest must be construed as a gift after the respective deaths of *F. H. S.* and *R. S.* to their respective children, and that there having been an absolute gift to each of them in the first instance only cut down in favour of his children, in the events which happened the fund was divisible in moieties between the representatives of *F. H. S.* and the children of *R. S.*

THIS was a petition presented for the purpose of having the rights of the persons interested in a fund in Court ascertained and declared, and of having the fund divided accordingly.

Dame *Elizabeth Hutchinson*, who died in April, 1827, by her will bequeathed certain stocks and securities and other personal estate to trustees upon trust to permit *Edward Synge* to receive the income during his life, with power to appoint a jointure thereout, and then proceeded as follows:—

"And subject thereto from and after the decease of the said *Edward Synge*, then in trust to and for the issue of the said *Edward Synge* in such shares and proportions as he shall by deed or will direct or appoint, and in failure of issue of the said *Edward Synge* I direct that the said capital stock shall be given to *Francis Hutchinson Synge* and the Rev. *Robert Synge*, sons of the late Sir *Robert Synge*, Bart., share and share alike, and after the decease of the said *Francis Hutchinson Synge* and his brother *Robert Synge*, I give and bequeath the above-mentioned money in different stocks to their children, share and share alike, and to their heirs for ever."

KAY, J.

1882

In re HUTCHINSON'S TRUSTS.

Francis Hutchinson Synge died without having had issue in August, 1834.

The Rev. *Robert Synge* died in September, 1862, leaving several children, some of whom were still living.

Edward Synge died without issue in January, 1882, and this petition was presented by one of the sons of *Robert Synge*. The question was whether the fund in Court was distributable in moieties between the representatives of *Francis Hutchinson Synge* on the one hand, and the children of the Rev. *Robert Synge* and their representatives on the other hand, or whether, in the events which happened, the children of the Rev. *Robert Synge* and their representatives were entitled to the whole fund.

Kekewich, Q.C., and *Follett*, for the Petitioner:—

The bequest after the death of the two brothers is a gift to a class composed of the children of both, if both have children, or if only one has children, of the children of such one; and *F. H. Synge* having died without issue, the whole trust fund has devolved upon the children of his brother *Robert* and their representatives.

They referred to *Smith* v. *Streatfield* (1).

Vernon Smith, for parties in the same interest.

Hastings, Q.C., and *B. Eyre*, for the legal personal representatives of *F. H. Synge*:—

There is here first a clear gift in unlimited terms to *Francis Hutchinson Synge* and *Robert Synge*, share and share alike, giving each of them an absolute interest as tenants in common; then follows the gift after the death of the brothers, which must be read distributively, so as to give the share of each of them respectively to his respective children if he has any. If he has not, the share originally given to him remains vested in him, and goes to his representatives: *Arrow* v. *Mellish* (2); *Wills* v. *Wills* (3); *Willes* v. *Douglas* (4).

(1) 1 Mer. 358.
(2) 1 De G. & Sm. 355.
(3) Law Rep. 20 Eq. 342.
(4) 10 Beav. 47.

[KAY, J., observed that in all those cases the word "at" occurred with reference to the death on which the gift was to take effect, which was in favour of a distributive construction, and his Lordship mentioned *Begley* v. *Cook* (1).]

"After" and "at" are convertible terms. *Begley* v. *Cook* was decided on very special language. In *Alt* v. *Gregory* (2) and in *Waldron* v. *Boulter* (3) the words were "from and after the decease," and in *Abrey* v. *Newman* (4) "after" only, yet the distributive construction prevailed. Moreover, the gift is to "their" children, and that must mean their respective children, because no children could be the children of both the brothers. Suppose *Francis* had died leaving children, there would, according to the contention of the other side, have been an intestacy until the death of *Robert*.

Davenport, for the trustee of the will.

Kekewich, in reply:—

The word "from" fixes the particular time, and is equivalent to "at;" here the only word is "after," and the gift is after the death of both the brothers. Therefore the cases which favour the introduction of the word "respectively" do not apply. He referred to *Swabey* v. *Goldie* (5).

KAY, J., after stating the words of the will, continued:—

Now, I confess, that, in the absence of authority, I should have thought that the meaning of those last words "after the decease of the said *Francis Hutchinson Synge* and his brother *Robert Synge*, I give and bequeath the above-mentioned money in different stocks to their children, share and share alike, and to their heirs for ever," was this. After the death of the two, which would mean the death of the survivor, I give the above-mentioned money to the children of both, share and share alike. That would constitute the children of both parents one class, and then,

(1) 3 Drew. 662.
(2) 8 D. M. & G. 221.
(3) 22 Beav. 284.
(4) 16 Beav. 431.
(5) 1 Ch. D. 380.

KAY, J.
1882
In re
HUTCHINSON'S TRUSTS.

if one had died without children the whole fund would go to the children of the other, if the other only left children. However, it is to be observed that there is a clear gift in the first instance, unlimited, of this capital fund to *Francis Hutchinson Synge* and the Rev. *Robert Synge*, share and share alike. If the will stopped there, there is no doubt whatever they would be tenants in common of absolute interests. It is urged upon me that the words "and after the decease of the said *Francis* and *Robert*, I give and bequeath the above-mentioned money in different stocks to their children, share and share alike, and to their heirs for ever," must be construed thus: "after death of each respectively, I give the respective share of each to his respective children." It seems to me, however, that there must be the addition at least of the word "respective," once, if not more than once, in order to arrive at that construction.

Now, I turn to the authorities. In the case of *Arrow* v. *Mellish* (1) the words were, to my wife for life, "and at her death I give and bequeath the same to my three nieces, *Elizabeth*, *Catharine*, and *Sarah*, and also to *Mary Arrow*, to be by them equally divided, share and share alike, and at their deaths," not "after their deaths"—"to go equally share and share alike to their children." It is not "after their death," as here, but "at their deaths," in the plural. The word "at" is used instead of "after." There the construction was that at the death of one, the share of that one went to her respective children.

In the case of *Willes* v. *Douglas* (2) the gift was in trust "to be equally divided between my first cousins *Mary*, *Charlotte*, and *Lucy*." The interest to be received by the trustees, and equally divided between the said *Mary*, *Charlotte*, and *Lucy*, "separate from and distinct from their said husbands, and for their sole use, and at their decease to be divided amongst their daughters." The same construction was there adopted that the share of each went to her respective daughters. Some stress was laid in the judgment upon the use of the words "separate from their husbands," which the Master of the Rolls said must mean "their respective husbands;" and "their sole use," which must mean "their respective sole use;" "at their decease," meaning also "at their respective

(1) 1 De G. & Sm. 355. (2) 10 Beav. 47.

decease;" and "to be divided among their daughters," "to be divided among their respective daughters."

In *Waldron* v. *Boulter* (1) there was a bequest of leasehold property upon trust to divide the rents equally between the testator's four grandchildren, *Thomas*, *Mary*, *Penelope*, and *Susannah*. "And from and after the decease of my said grandchildren in trust for such lawful issue as they or any of them shall leave lawfully begotten as tenants in common." There the words were not "at the death" or "at the deaths," as in the two cases I have already cited, but "from and after the decease," in the singular, "of my said grandchildren," which brings it very much nearer to the case I have to deal with. There it was held, *Willes* v. *Douglas* (2) being cited, that the grandchildren took as tenants in common for life, with remainder to such issue as each should leave, and that on the death of each grandchild such issue as survived him took his one-fourth share in the first bequest as tenants in common, That is following, in fact, the decisions in the two cases I have before referred to.

Then again, in *Turner* v. *Whittaker* (3), the words were: "At the death of my wife I desire that the annuity held by her shall be equally divided between my sons *Edward* and *Alfred*, but not the principal; that I bequeath to their children, to be divided equally among them at the death of my sons *Edward* and *Alfred Turner*." The same construction was there adopted, the words being like the words of the first two cases I cited—"at" and not "after."

Then in *Wills* v. *Wills* (4) the words were: "The interest of the residue of my estate vested in the names of the said trustees shall be paid half-yearly to my sons *Charles* and *John* equally for their natural lives, and at their death the principal to be divided equally between the children of the said *Charles* and *John*." The same construction was there adopted.

Now in some of those cases the word "death" was used in the singular, and in some in the plural. In one of those cases at least, the word was "after" the death; in others it was "at," but no distinction was made on that account.

(1) 22 Beav. 284.
(2) 10 Beav. 47.
(3) 23 Beav. 196
(4) Law Rep. 20 Eq. 342.

KAY, J.
1882
In re HUTCHINSON'S TRUSTS.

In *Abrey* v. *Newman* (1) the words were: "All the above-named property to be equally divided between *Benjamin James* and his wife *Ann James*, and *Charles Abrey* and his wife, for the period of their natural lives, after which to be equally divided between their children, that is to say, the children of *Benjamin James* and *Charles Abrey* above mentioned." That case is of very great importance, because the word "after" was read as meaning "after their respective deaths," but by reason of the last words I read, viz., "that is to say the children of *Benjamin James* and *Charles Abrey*," the moiety set free by the death of one was held to be divisible between the children of both; that was owing to the additional words. That is another authority to shew that the word "after" does not make any distinction in this construction; but the word "after" may be read like the word "at," as though it were after their respective deaths, just as the word "at" is.

The balance of authority seems to me, therefore, to shew that there has been laid down what I must consider rather an artificial rule, a rule which I suppose has considerable advantages, if both the tenants for life, or the persons to whom the interest was first given have children; but in this case one of them has died before the other without issue; and the question is, under those circumstances, how the gift is to be construed. I think I am bound by authority to say that the words "after the decease of the said *Francis Hutchinson Synge* and his brother *Robert Synge*," mean after their respective deaths, or after the decease of each of them, and that there is a disposition of the share of each which was an absolute interest in the first instance upon his death.

Now what is the disposition? It is to their children. Well, following the decisions, and considerably assisted, I must say, by an argument which Mr. *Hastings* used, and which I adopt, that in that place this must mean their respective children, because there could not possibly be any child who could say I am the child of both, I am bound to read "after the death" as meaning "after the death of each," and "to their children" as "to their respective children." I admit the force of Mr. *Hastings's* argument on that part of the gift; and I think these authorities have laid down a

(1) 16 Beav. 431.

rule of construction which I am bound to follow; therefore, I so decide. Accordingly, there having been an absolute gift in the first instance, only cut down for the benefit of children; in the events which have happened, one moiety belongs to the representatives of *Francis Hutchinson Synge*, and the other moiety is divisible equally between the children of *Robert Synge* and the persons claiming under them.

Solicitors: *Gregory, Rowcliffes & Co.*; *Peacock & Goddard*; *Campbell, Reeves, & Co.*; *Merediths & Co.*

W. W. K.

In re CLARKE.

[1882 C. 2627.]

Infant—Guardian—Religious Education—Wishes of deceased Father—Abandonment of Father's Right.

An Englishman, who was a Protestant, in October, 1869, married in *Germany* a German lady who was a Roman Catholic. Previously to the marriage a written agreement was signed by them both, which provided that the children (if any) of the marriage should be educated in the Roman Catholic faith. After the marriage the husband and wife lived together in *Germany*. He never attended a Protestant place of worship, but often went to mass with his wife. There were three children of the marriage—a daughter born in 1871, a son born in 1873, and another daughter born, just after the death of the father, in April, 1876. The first two children were, with the father's knowledge, baptized as Roman Catholics, and, in the case of the son, a Roman Catholic priest in *England*, whom the father knew, acted as godfather at the request of the father himself. The father allowed the mother to bring up the two children as Roman Catholics. He died intestate, and had not appointed any guardian to his children. His only property was some real estate in *Lancashire*, worth more than £2000 a year, which passed to his infant son as his heir-at-law, subject to the life estate of the paternal grandfather, who died in 1881. The mother had no fortune of her own. She, as next friend of the infant son, in 1882 took out a summons for the appointment of a guardian and the settlement of a scheme for his maintenance and education. She desired that he should be educated in the Roman Catholic faith. The paternal relations, on the contrary, wished that the infant should be brought up as a Protestant:—

Held, that the father by his conduct had abandoned his right to have the

KAY, J.

1882

In re CLARKE.

child brought up in his own faith, and had indicated a wish that he should be brought up as a Roman Catholic:

Held, also, that under the circumstances it would be most for the benefit of the infant that he should be educated in the Roman Catholic faith.

Hawksworth v. *Hawksworth* (1), *Andrews* v. *Salt* (2), and *Hill* v. *Hill* (3) considered.

ADJOURNED SUMMONS.

This was a summons on behalf of *Robert J. A. Clarke*, an infant, by his mother as next friend, asking for the appointment of a guardian of the person of the infant during his minority; for the appointment of a receiver of the rents and profits of certain real estates belonging to the infant, and for the settlement of a scheme for his maintenance and education.

The principal question was whether the infant should be educated as a Roman Catholic or as a Protestant, his father being dead.

Robert A. Clarke, the father of the infant, was an Englishman and a member of the Church of *England*. Subject to the life estate of his own father, he was seised of real estate in *Lancashire* worth about £2600 a year. The estate was also charged with an annuity of £700 a year to the mother of *Robert A. Clarke*, in case she should survive her husband. In October, 1869, he married *Emma Müller*, a German lady, who was a Roman Catholic. The marriage ceremony was performed at the British Consulate in *Frankfort*, on the 5th of October, 1869, and in a Catholic Church in *Germany* on the 6th of October, 1869. On the 15th of June, 1869, *Robert A. Clarke*, after he had become engaged to Miss *Müller*, wrote to his mother as follows: "*Emma* was here on Sunday. I had a conversation with her about religion, and I am sure that all will be satisfactorily arranged for the future. On this point we both understand each other perfectly. If we should have a family, in order to please her and satisfy her church, I shall allow the children to be baptized Catholic, but, as she herself solemnly assured me, this is all that she would expect. She quite understands our feelings on the subject, and will have no objection whatever to have such of her children as may afterwards,

(1) Law Rep. 6 Ch. 539. (2) Law Rep. 8 Ch. 622.

(3) 10 W. R. 400.

in the course of time, succeed to my fortune, educated in the Church of *England* faith. I wish you clearly to understand that in the Catholic Church some such stipulation is always made. *Emma* herself acknowledges that it is not right, and says that she considers the promise is quite sufficiently observed if the family are christened Catholic. I believe and trust her perfectly. I am convinced that on this point there will be no further disagreement between us." About the end of July, 1869, he wrote thus to Miss *Müller*: "If we marry in your church, and the condition is made that if there are children they shall be Catholic, so let it be. Let them be baptized Catholic, and you yourself, as mother, bring them up as you please, with this proviso, that, if I have a son and he is brought up as an Englishman, when he is old enough to judge for himself you will have no objection to his changing his religion, if he so wishes."

Previously to the marriage, the following document, written in *German*, and dated the 29th of August, 1869, was signed by the intended husband and wife:—

"We, the undersigned betrothed *Robert Addison Clarke* (Church of *England*) and *Emma Müller* (Catholic), promise herewith that we will educate the children of our intended marriage in the Catholic religion; and I, the Catholic bride, promise that I will, by word and example, use my best endeavours to shew my future husband the truth of my holy religion; and I, the bridegroom, promise that I will in no way prevent my future wife from the exercise of her religion."

After the marriage the husband and wife lived in *Germany*, with the exception of a period of six months, during which they lived at *Cockerham*, in *Lancashire*. There were three children of the marriage, viz., a daughter, born at *Cockerham* on the 1st of February, 1871; a son (the infant now in question), born at *Biebrich* in *Germany* on the 9th of November, 1873; and a daughter born in *Germany* on the 11th of April, 1876, after the death of the father, who died at *Biebrich* on the 6th of April, 1876. He died intestate, and had appointed no guardian to his children. He had no other property than his reversionary interest in the real estate in *Lancashire*. His wife had no property of her own. His

KAY, J. 1882 *In re* CLARKE.

father survived him and died on the 8th of June, 1881, whereupon the infant, as heir-at-law of his father, became entitled in possession to the real estate, subject to the annuity of £700 a year to his paternal grandmother.

An affidavit made by the infant's mother contained the following statements, which were not contradicted:—"My eldest daughter *Mary*, who was born in *England* during our visit here, was baptized at *Cockerham* by a Catholic priest. My son was baptized at *Biebrich* by a Roman Catholic priest. I was very ill at the time and my husband made all necessary arrangements, and was present when the children were christened, and took the greatest interest in the ceremony. My husband died when my eldest daughter was about five years old. I had then instructed her as far as possible in my religion. My husband bought Catholic prayer books and rosaries for her, and often went to mass with us. He did not attend any Protestant place of worship, although there was an English Protestant church in *Wiesbaden*, which is about three-quarters of an hour's walk from *Biebrich*, and easily reached by railway from that place. In fact I never had a word of difference with my husband after our marriage about the bringing up or religious education of our children, nor did he ever express a wish that they should be brought up or educated in any faith other than the Roman Catholic faith. My husband after the birth of my son applied to the Rev. *James Swarbrick*, a Roman Catholic priest residing in *Lancashire*, asking him to become godfather to the infant, to which Mr. *Swarbrick* consented, and accordingly became his godfather. Since the death of my husband I have brought up and educated my three children in the Catholic faith." She also said that her husband bought a handsome illustrated Catholic Bible as a present to his infant son. And, with reference to the letter of the 15th of June, 1869, written by her husband to his mother, she said: "A conversation took place between my late husband and myself at the railway station, *Biebrich*, in consequence of which this letter was probably written. I told him that, so far as I was concerned, my own feelings did not operate in the matter, but that it was my duty to my church that any children we might have should be brought up Catholics. I deny that I ever said that I should have

no objection whatever to have such of the children as might afterwards succeed to his fortune educated in the Church of *England* faith, and the statement contained in the letter of my husband must have been made under a misapprehension of the conversation which took place between us."

Mr. *Swarbrick* made an affidavit in which he said:—"I knew and was well acquainted with the father of the infant. He was resident in the years 1870 and 1871 at a farm in *Cockerham*, which adjoins the glebe of my church. Some time after he came to reside there he called on me and informed me that he had entered into an undertaking with his wife before their marriage that any children they might have were to be reared and educated in the Catholic religion, and he informed me of his firm determination of faithfully fulfilling the undertaking. Afterwards, in the first week of February, 1871, when his first child was born, he again called on me and requested me to baptize his child, and I did baptize his child in his presence on the 13th of February, 1871. Shortly afterwards he went back to reside at *Biebrich*, and, on the birth of his second child in November, 1873, he wrote to me requesting me to stand godfather to his boy. I have destroyed his letter, but, to the best of my belief, the words in his letter were, 'We have chosen you to be its godfather, and earnestly hope you will accept the responsibility,' to which I duly replied by signifying my acceptance of it, and became and am godfather to the infant. The father continued at intervals to write to me up to the time of his death, and there was not throughout the correspondence, nor in any intercourse which passed between us, any intimation, direct or indirect, that he had swerved from the determination he expressed to me when he first called upon me, nor did he ever state to me that he wished his son to be brought up as a Protestant if he succeeded to the family estate, or that he should choose his own religion when he was old enough to judge for himself."

The infant's paternal grandmother made an affidavit, in which she said that during her son's visit to *England* after his marriage he came to her house for two or three days, and that she saw him on two or three other occasions; and she added, "but I cannot distinctly remember that anything was said as to the religion in

KAY, J.
1882
In re CLARKE.

which his children were to be brought up, but I do remember his saying that, if a son were born to him, he would wish him to be sent to a public school in *England*." And she said: "It is my wish, as it was very strongly the wish of my late husband, that the boy should be brought up as a Protestant, the faith of his late father; but, having thus expressed my wish, I am willing to leave the question in the hands of the Court."

J. Pearson, Q.C., and *F. G. Bagshawe*, for the summons:—

The father by his conduct abandoned his right to have the child brought up in his own religion, and in fact acted so as to indicate a wish that he should be brought up as a Roman Catholic: *Talbot* v. *Earl of Shrewsbury* (1); *Andrews* v. *Salt* (2); *Hill* v. *Hill* (3).

[KAY, J., referred to *In re Agar-Ellis* (4).]

There is a series of acts shewing the father's intention that his children should be brought up as Roman Catholics.

Moreover, rightly or wrongly, the boy has been brought up as a Roman Catholic, and the Court will not now interfere until he is of an age to judge for himself which religion he will adopt.

The contest here is not with the father himself, as it was in *In re Agar-Ellis* and *In re Meades* (5) and in *In re Grimes* (6). The decision in *Stourton* v. *Stourton* (7) was on the ground that the child's mind had become imbued with the distinctive doctrines of a particular faith. *Hawksworth* v. *Hawksworth* (8) is the case most like the present case, but there was no suggestion there of any antenuptial agreement between the father and the mother as to the religious education of their children.

[KAY, J.:—In *Hawksworth* v. *Hawksworth* Lord Justice *James* said that the Court "should have sacred regard to the religion of the father in dealing with the child."]

That is somewhat qualified by what was said in *Andrews* v. *Salt*.

[KAY, J., referred to *Skinner* v. *Orde* (9).]

(1) 4 My. & Cr. 672.
(2) Law Rep. 8 Ch. 622.
(3) 10 W. R. 400.
(4) 10 Ch. D. 49.
(5) Ir. Rep. 5 Eq. 98.
(6) Ir. Rep. 11 Eq. 465.
(7) 8 D. M. & G. 760.
(8) Law Rep. 6 Ch. 539.
(9) Law Rep. 4 P. C. 60.

8 Jur. N.S. 867 3 Jur. N.S. 52

Cookson, Q.C., and *E. Bond*, for the paternal grandmother and other paternal relations of the infant:—

The infant belongs to a Protestant family, and he is entitled in possession to a landed estate in *England* worth more than £2000. For this, among other reasons, it will be most for his benefit to be brought up as a Protestant: *Austin* v. *Austin* (1). The last wish which the father appears to have expressed about the education of the boy was that he should be sent to a public school in *England*. That could not mean a Roman Catholic school, such as *Stonyhurst*. The fact that the father allowed the child to be baptized in a Roman Catholic church is not conclusive as to his intention, for such a baptism is held good by the Church of *England*. *Hawksworth* v. *Hawksworth* (2) and *Andrews* v. *Salt* (3) are really authorities in our favour. *Hill* v. *Hill* (4) was a peculiar case. The Court saw that the father's will, which he made just before his death, must have been made under the influence of the Roman Catholic priest who was then attending him, and moreover, there the father had had the children openly baptized in a Protestant place of worship. It is not shewn that there was any such open baptism in the present case. No injury can be done to the child by directing that he shall now be educated as a Protestant. He will go to school, and will be at home with his mother only for a short time during his holidays. The rule of the Court is that the religion of the father is to prevail, except under very special circumstances. The interest of the child does not in the present case prevent the application of the rule: *Hawksworth* v. *Hawksworth*.

KAY, J.:—

A case of this kind certainly places the Court in as great a difficulty as any case which ever comes before it. But, in my opinion, the Court ought to decide such a case without the smallest bias in favour of one particular faith over any other faith in which children may be brought up.

Now there is no doubt about the ordinary rule of the Court. I

(1) 4 D. J. & S. 716. 11 Jur. N.S. 536
(2) Law Rep. 6 Ch. 539.
(3) Law Rep. 8 Ch. 622.
(4) 10 W. R. 400. 8 Jur. N.S. 609

KAY, J.
1882
In re
CLARKE.

will state it in the words of Lord Justice *James* in *Hawksworth* v. *Hawksworth* (1). "The rule of the Court is that the Court, or any persons who have the guardianship of a child after the father's death, should have sacred regard to the religion of the father in dealing with the child, and, unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religious faith may have been." On the other hand, doubtless the Court has to consider, and to make out as far as it can, whether the father has indicated any desire as to the particular faith in which the child should be brought up, and, of course, if the Court comes to the conclusion that the father has indicated such a desire, it would be bound, as I understand the authorities, to carry out that wish of the father. Moreover, if the father, without in any direct manner indicating his own desire, has so acted with regard to his child as in fact to have chosen the faith in which he should be brought up, if he has abdicated, or, as it has been called in some of the cases, "abandoned" his right to have the child brought up in his own faith, that, again, is a thing to which the Court is bound to have regard in reference to the further education of any child whom he may have left. And there is a third thing to which the Court is always bound to have great regard, especially where there is any great doubt or difficulty in deciding what the wishes of the father, if he had lived, might have been, viz., what is for the benefit of the child under the circumstances of the case.

Before I mention the facts of the present case I will read what was said by Lord Justice *Mellish* in delivering the judgment of the Court in *Andrews* v. *Salt* (2). "The first question we shall consider is, what is the legal effect of an agreement, made before marriage between a husband and wife of different religious persuasions, that boys should be educated in the religion of the father and girls in the religion of the mother. We are of opinion that such an agreement is not binding as a legal contract. No damages can be recovered for a breach of it in a Court of Law, and it cannot be enforced by a suit for specific performance in Equity. We think that a father cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law

(1) Law Rep. 6 Ch. 542. (2) Law Rep. 8 Ch. 636.

gives him for the benefit of his children and not for his own. We entirely agree with the decision of the Lord Chancellor of *Ireland* in *In re Meades* (1), in which he held that the Court could not during the lifetime of a father compel him out of his own funds to educate a child in a different religion from his own. So also, if after a father's death it appeared to the Court that it was most for the benefit of a child to be educated in the religion of his father, we think that the Court would not abstain from ordering him to be so educated, because the father had agreed with the mother that the child should be educated in her religion. On the other hand, if after the death of the father circumstances happen which, in the opinion of the Court, make it for the benefit of a child to be educated in the religion of the mother, and the question arises whether the father had so acted that he ought to be held in this Court to have waived or abandoned his right to have his child educated in his own religion, the fact that the father before marriage promised the mother that girls, the issue of the marriage, should be educated in her religion, is a circumstance to which, in our opinion, weight, and perhaps great weight, ought to be attached. This appears to have been the opinion of Lord *Hatherley* from what he said on the subject in *Hill* v. *Hill* (2), though in that case he did not think that the fact of the agreement having been made was satisfactorily proved." In *Hill* v. *Hill* Lord *Hatherley*, then Vice-Chancellor, laid very great stress on the circumstance that the children had been baptized in a particular faith, that of the Church of *England*, and he says (3): "In 1859 the younger child was born. The testator allowed her to be baptized openly and publicly in church according to the rites of the Church of *England*. Without dwelling too strictly upon the solemn engagement then undertaken by the sponsors to see that the child be instructed and brought up in the faith of the Church of *England*, it was impossible to overlook this most important fact, that the father allowed the child to be openly presented to the congregation as to be brought up in the Church of *England*, and there received into Christ's flock." Without going particularly through all the facts of that case, it is sufficient to say the Vice-Chan-

(1) Ir. Rep. 5 Eq. 98.

(2) 10 W. R. 400.

(3) 10 W. R. 401.

KAY, J. 1882 *In re* CLARKE.

cellor came to the conclusion that, under the circumstances, there had been what amounted to a total abdication by the father of his right of controlling the religious education of his children, and then, at the end of his judgment, he says (1), "He should have had great pain if he had felt himself bound to direct that the children must be brought up in the Roman Catholic faith, and the result would probably have been for the mother to withdraw them from the jurisdiction and carry them to *Scotland*. Besides this, there would be great danger of placing the children in an oscillating state, between the instruction received by them at school and the ideas derived from association with their mother during the holidays." In that case the mother was a Protestant.

Those cases seem to me to lay down a very clear rule for the Court to act upon, and such as I have already endeavoured to enunciate.

Now I must turn to the facts of this case. It seems that in October, 1869, the father, who was an Englishman and by profession a Protestant, married in *Germany* a German lady who was a Roman Catholic. Before that marriage he had written to his mother a letter which I must suppose was never seen by the wife; it was certainly not assented to by her.

[His Lordship read the letter of the 15th of June, 1869, to the mother, the letter of July, 1869, to the intended wife, and the agreement of the 29th of August, 1869, and continued:—]

Therefore, I must assume that, at the time when the husband wrote to his mother, he and his then intended wife had not come quite to a perfect agreement as to the children, and that the perfect agreement to which they did afterwards come was that which is expressed in the document which they both signed, but with, perhaps, this reservation understood between them, that, if there should be a son of the marriage, he should, when he attained such an age as to be able to judge for himself, be quite at liberty to choose what religion he would adopt.

Now there can be no doubt, as I have already pointed out in what I have read from the authorities, that such an agreement is not at all binding. It could not be enforced in any way in *England*, and the father if he were living, might say, "I have changed

(1) 10 W. R. 402.

my mind, and I now desire to have the children brought up in whatever faith I choose." But did he change his mind? I cannot help coming to the conclusion that, at the time of the marriage, he had come to an agreement with his wife, and to a decision himself, that his children should be educated in the Roman Catholic faith, with that possible reservation as to a son afterwards choosing his own religion which is indicated in that letter written to the wife after the date of the letter to the mother.

But the question is, did he afterwards change his mind? As to that I have got these indications. [His Lordship read the evidence of the wife and the paternal grandmother, and referred to the evidence of Mr. *Swarbrick* and the other facts as above stated, and continued:—]

I have no indication whatever of the father's wishes and intentions beyond these facts which I have stated. He died intestate, that is, he did not leave any will expressing any intention about the education of his children, and he appointed no guardians of them. But, after the letter which he wrote to his mother in June, 1869, I have a series of indications of the father's intentions, all of which are consistent, and all of which, without a single exception, point to the bringing up of the children in the Roman Catholic faith, and the only thing which is relied upon as an indication of a different intention is, the expression of a wish that his son should be sent to an English public school. I do not think I am at liberty to treat that as an indication of the religion in which he intended the son to be brought up. I have a series of other indications, and I have added to them the fact that, so far as the children were capable of receiving any religious teaching, the religious teaching which they have had up to this time, up to the time of his death, and since his death, was that of the Roman Catholic Church. The eldest daughter was at the time of his death five years old, and, therefore, she, at all events, was then capable of some kind of religious teaching.

Therefore, I think (trying, of course, to divest my mind of the bias which it naturally has in favour of the bringing up of an English boy, who is to succeed to an English estate, inherited by him from his father's Protestant family, in the Protestant faith), I am bound to consider that I have an indication of the wish of the

KAY, J.
1882
In re CLARKE.

father that this was not to be so, and to conclude that, if he were living now, he would desire that the boy should be brought up in the faith which his mother professes, the faith in which his sisters will be brought up, and the faith in which, so far as every indication which he gave during his lifetime goes, the father intended that the son should be brought up.

Well, then, taking that to be so, it might not be in itself conclusive, and the next thing I have to consider is what is really for the benefit of the child himself. It would certainly not be for the benefit of a child of such tender years (he is now only between eight and nine years of age) to take him away from the custody of his mother. The daughters, I understand, have no fortune, they are not wards of Court, and they will inevitably, so far as I can foresee, be brought up in the faith of their mother as Roman Catholics. If I were now to direct that the son should be brought up as a Protestant, I must either take him out of the custody of his mother, which would be in every way a great misfortune, or I must give directions which would make the mother's household a divided household. I must direct that he is to be educated, while he is in her custody, in the Protestant religion, while the other children are being educated as Roman Catholics, and when he goes to school he must go back to live, during his holidays, in a Roman Catholic household, being educated, when he is away from home, in a different faith. I cannot help regarding that as anything but for the benefit of the infant. He has inherited an estate in *England*, but then I cannot help taking notice of the fact that it is situate in a county in which there are a very large number of Roman Catholics, even among the upper classes, the landed gentry of the county, and in which he will find, if he is brought up in that faith, plenty of companions of his own station of the same faith, and he will be by no means in the position in which a Roman Catholic gentleman might be in any other county in *England*, but he will be in a county in which some of the first people are of the Roman Catholic faith. And, even if he should be sent to a public school in *England*, which will be a matter for the Court to consider hereafter, I cannot possibly assume that the state of things in public schools in *England* is such that it will be a disadvantage to him there to have been brought up in the Roman

Catholic faith. Therefore, looking at the benefit of the infant himself, it seems to me, on the whole, that it is more for his benefit that he should continue to live with his mother, and that he should be brought up in the faith which his mother professes, and in which his two sisters will certainly be brought up. It seems to me in every way to be most for his benefit that he should be brought up in the Roman Catholic faith.

Therefore, for the two reasons which ought to determine the decision of the Court in a case of this kind, namely, that the father by his acts distinctly indicated what his wish and desire in the matter was, and also that it seems to me to be most for the benefit of the infant to carry out that wish, I feel bound to come to the conclusion that he ought to be brought up in the Roman Catholic faith.

Of course, in coming to this conclusion, I am influenced by what the wife says of the father's conduct in reference to his own religious duties. It seems, from the account given by her, that he never attended the English church at all. He went continually to mass with her, although he did not profess the Roman Catholic faith himself. There is, no doubt, a letter written by him to his mother, dated in May, 1869, in which he says, "And then, as regards my being about to become a Roman Catholic. That you do not for a moment credit this report is a great comfort to me, for the last thing I should think of doing in this world would be to change my religion. *Emma's* family are Catholic. That, I have no doubt, you have guessed already. Well, an educated Romanist is not, as you must be aware, bigoted. Of course, I marry her on the mutual understanding that we both adhere to our own religions." Well, there is, no doubt, that letter, but, so far as his practice is concerned, I have it proved that he never went to a Protestant place of worship at all after his marriage, but that he continually attended a Roman Catholic place of worship. Therefore, he certainly was not what he would himself have called a bigoted Protestant; he was a gentleman who, at any rate, does not seem to have had any reluctance to attend constantly at Roman Catholic places of worship, while not attending at all at a Protestant place of worship. That is another indication, which I must take into account, that, if he were now living,

KAY, J. 1882 *In re* CLARKE.

he would say, "I desire to have my children brought up in the Roman Catholic faith." Accordingly, the order will be to appoint, as all the parties indeed seem to desire, the mother as guardian of the infant, and I will appoint the uncle also a guardian, upon an affidavit of his fitness being produced. Then, as to the maintenance. It is asked that an allowance should be made of £800 a year, and that it should begin from the death of the grandfather a year ago. That does not seem to be too large a sum, considering that the mother has no means of her own. I think it is a proper allowance to make. The two guardians must undertake to bring the infant within the jurisdiction of the Court whenever the Court requires that to be done. Of course I have the means of enforcing that undertaking, because at any moment I can stop the allowance, which will be made only for one year or until further order.

Solicitors: *Bower, Cotton, & Bower,* agents for *Sharp & Son, Lancaster.*

W. L. C.

KAY, J. 1882 *Aug.* 5.

DAY *v.* BATTY.

[1880 D. 1297.]

Practice—Parties having liberty to attend—Costs.

Mere liberty to attend the proceedings under an administration judgment does not entitle the parties having the liberty to the costs of their attendance in Chambers as a matter of course. In order to entitle such parties to such costs the order giving the liberty to attend should expressly provide that they are to be entitled thereto.

UPON the further consideration of an administration action in which judgment had been given in the ordinary form, the question arose whether certain persons who had obtained liberty to attend the proceedings under the judgment were entitled to the costs of their attendance in Chambers. The order giving the liberty to attend was silent as to such costs.

Henry Fellows, T. A. Roberts, and *Freeman,* appeared for the various parties.

KAY, J. :—

KAY, J.
1882
DAY
v.
BATTY.

Mere liberty to attend the proceedings under a judgment does not entitle the parties obtaining the liberty to the costs of their attendance in Chambers as a matter of course, but the Court still has a discretion as to allowing their costs. To entitle them thereto the order giving the liberty to attend should expressly provide that they are to be entitled to their costs of such attendance.

Solicitors: *Stibbard, Gibson, & Co.; Harvey, Oliver, & Capron; T. Durant.*

W. W. K.

In re WORKING MEN'S MUTUAL SOCIETY.

KAY, J.
1882
Aug. 5.

Professional Witness—Auctioneer—Expenses—Loss of Time.

An auctioneer summoned to give evidence before a special examiner appointed under proceedings in the Chancery Division is, as a professional witness, entitled to be paid a guinea a day by way of compensation for his loss of time, together with the amount of his travelling expenses, if any, including therein his railway fare, first-class, from his residence to the place of his examination and back again. And, although sworn, he may refuse to answer any questions until a sum sufficient to cover these amounts has been paid him.

IN the course of the proceedings in the winding-up of the *Working Men's Mutual Society*, Mr. *George Kossuth Mazzini Reynolds*, an auctioneer, residing at *Andover*, attended on the 26th of July before a special examiner appointed in the matter of the winding-up for the purpose of being examined. Having been sworn, he refused to answer any questions until his expenses for the day, which he stated were three guineas, had been paid to him. A guinea was tendered to him, which he refused as insufficient. He was then asked whether he had come up from *Andover* that morning, what was his railway fare, and whether he would swear that his expenses were three guineas; but he refused to answer any questions whatever until his expenses were paid, when he said he should be prepared to answer all proper questions. He also stated that the time consumed in these examinations involved a considerable loss

KAY, J.
1882
In re WORKING MEN'S MUTUAL SOCIETY.

to him, which would not be nearly compensated by the sum of three guineas.

Two guineas were then tendered to him, which he still refused, and the examination was then adjourned.

A motion was now made in the liquidation on behalf of the official liquidator that Mr. *Reynolds* might be committed for contempt in refusing to answer any question on his examination before the special examiner. A certificate had been made by the special examiner stating the proceedings that had taken place before him; and there was evidence that a first-class return ticket from *Andover* (from whence Mr. *Reynolds* had that morning come) to *London* cost £1 3*s*.

Hastings, Q.C., and *Beddall*, for the official liquidator, in support of the motion:—

A witness, after he has been sworn, can only claim his expenses, and is not entitled to claim any compensation for loss of time. This is the rule at *nisi prius*, and the same rule will be adopted in the Chancery Division.

[They referred to *Newton* v. *Harland* (1).]

W. Pearson, Q.C., and *Terrell*, for Mr. *Reynolds*:—

The witness is an auctioneer carrying on an extensive business at *Andover*. He was entitled to refuse to answer any questions until his expenses, including the cost of his first-class return railway fare, together with compensation for his loss of time, had been paid to him; and as the first-class return railway fare from *Andover* to *London* is £1 3*s*., the three guineas he demanded was a proper sum. A professional witness, which term includes an auctioneer, has a right, before giving his evidence, to demand compensation for his loss of time. In *Wiltshire* v. *Marshall* (2) an auctioneer summoned as a witness in a Chancery proceeding was allowed a guinea a day by Vice-Chancellor *Wood* for his loss of time, in addition to a guinea a day for maintenance.

[KAY, J.:—There is another case of *Clark* v. *Gill* (3), which is to the same effect. There the witness was a medical man residing in *London*.]

(1) 9 Dowl. 16. (2) W. N. 1866, p. 80. (3) 1 K. & J. 19.

Hastings, in reply, referred to *Chitty's Archbold* (1), and contended that even if the witness was entitled to a guinea a-day for loss of time, the £2 2*s.* tendered him was sufficient to cover that sum, together with all his expenses *bonâ fide* incurred, the particulars of which he had refused to state.

KAY, J.:—

I have looked through all the cases upon the point, for it would be a very unfortunate thing if a different rule should be laid down in the Chancery Courts from that which prevails at Common Law.

In *Clark* v. *Gill* (2) the Vice-Chancellor stated that he was anxious to follow the rule adopted at Common Law, and that he had made inquiry of the best authority at Common Law, and had in consequence obtained the opinion of Mr. *Bunce*, one of the Masters of the Court of Queen's Bench, and neither of them had any doubt that a professional witness had a right to demand compensation for his loss of time before being sworn, and he then read the following written statement from Mr. *Bunce* [His Lordship read it, and continued :—] It seems to come to this, that a medical witness is entitled to require for his expenses in attending to give evidence in *London* one guinea a-day, apart from travelling expenses, and that the old rule that a witness was bound to attend and give evidence, when he lived in the same town, on payment of 1*s.*, no longer holds good since the *Common Law Procedure Act*, 1852. And if the witness is a professional man I must take it that one guinea a-day will be allowed to him for loss of time. That point is referred to in *Taylor* on Evidence, where it is said (3): "No order has yet been issued by the Lord Chancellor with respect to the remuneration of witnesses in the Chancery Division of the High Court; but it has been assumed that the taxing officers of the Courts in that Division ought, as a general rule, but not servilely, to regulate the allowances upon the same basis as at Common Law; and, in one case, Vice-Chancellor *Wood* has gone so far as to hold that a medical witness, residing in *London*, was justified in refusing to give evidence before the examiner unless he was first paid for his attendance at the rate of a guinea a-day."

(1) Page 23. (2) 1 K. & J. 19. (3) 7th Ed. p. 1043.

KAY, J.
1882
In re WORKING MEN'S MUTUAL SOCIETY.

There are two other cases to which I ought to refer. The first is *Brocas* v. *Lloyd* (1), in which the Master of the Rolls referred to the statute of 5 Eliz. c. 9, and to authorities which established that Courts of law would not grant an attachment against a witness for not obeying a subpœna, unless the whole of the necessary expense of going to the place of trial, of his return from it, and also during his necessary stay there, had been tendered to him, and said that the general rule at Law, which was followed in Equity, was to allow £1 1*s.* a day for the expenses of board and lodging of a gentleman. The second is *Collins* v. *Godefroy* (2). That was not a case of demanding payment before giving evidence, but one in which after evidence had been given an action was brought to recover compensation for loss of time. Moreover, it was a case under the old practice. I must then take it as having been decided in Equity (no doubt upon authority at Common Law) that an allowance must be made to a professional man as compensation for his loss of time. Now here the witness is an auctioneer, residing at *Andover*, and in the table of allowances to witnesses in *Chitty's Archbold* (3) engineers or surveyors are indicated as receiving a guinea a-day. I was moreover referred to a case in the *Weekly Notes* of *Wiltshire* v. *Marshall* (4), in which it is stated that Vice-Chancellor *Wood* allowed an auctioneer and valuer two guineas a-day, one guinea for loss of time and one guinea for maintenance. The balance of authority, therefore, is in favour of allowing to a person in the position of an auctioneer a guinea a-day for his loss of time, and I have evidence before me that the first-class return ticket (to which I think he is entitled) from *Andover* to *London* is £1 3*s.* That being so, the £2 2*s.* tendered to him was not a sufficient sum, and I must accordingly refuse this motion.

Solicitors: *Beall; G. S. & H. Brandon.*

(1) 23 Beav. 129. (3) 12th Ed. p. 1775.
(2) 1 B. & Ad. 950. (4) W. N. 1866, p. 80.

W. W. K.

WALKER *v.* POOLE.

KAY, J.

1882

Aug. 7.

[1882 W. 766.]

Affidavit—Documents—Prolixity.

An affidavit as to documents setting out a very large number of letters instead of referring to them in bundles properly identified, was ordered to be taken off the file, the costs to be paid by the Defendants.

THIS was an action in which the Plaintiffs claimed an inquiry of what the real estates devised by the will of the testator, *Charles Walker*, consisted, and for accounts of moneys received from the sale thereof by the Defendants *Poole* and *Hughes*.

The Defendants *Poole* and *Hughes* made an affidavit of documents, which the Plaintiffs complained of as an abuse of the practice of the Court by reason of its prolixity; it contained between 600 and 700 folios, and £11 12*s*. 4*d*. was charged for a copy. The Defendants were solicitors.

This was a motion to take such affidavit off the file.

Short particulars of 2275 letters were given in the affidavit, which amounted to sixty-six pages. The particulars consisted of the dates and the names of the senders and receivers.

Cozens-Hardy, Q.C., and *Oswald*, for the motion:—

Similar orders have been made: *Taylor* v. *Keily* (before M.R. March 2nd, 1876); *Osmaston* v. *Association of Land Financiers* (before M.R. April 12th, 1878); *Owens* v. *Emmens* (before V.-C. *Malins*, Nov. 18th, 1875). It is sufficient to describe the letters by bundles properly identified: *Taylor* v. *Batten* (1).

J. Pearson, Q.C., and *Northmore Lawrence*, *contrà*:—

The Plaintiffs do not complain that any document is irrelevant. It is at most a question of costs, which the Taxing Master can deal with under rule 18 of the Additional Rules as to Costs, 1875.

(1) 4 Q. B. D. 85.

KAY, J.

1882

WALKER v. POOLE.

KAY, J.:—

This is not an action for general administration, but only for inquiries as to real estate. The Defendants, who are trustees and solicitors, have put in an affidavit of documents, many of which go back to a date long past, and I find fifteen or sixteen pages of the affidavit taken up with references to letters, which are all entered in the affidavit in this way: "16th April, 1867, a copy of a letter from *Poole* to *Walker*;" then follow detailed references to similar letters, which amount to about 2275 in number. The ordinary mode of setting out such letters has been settled after an immense amount of litigation, and the proper method is to refer to them as contained in a bundle, each document in the bundle being identified by a letter, or some other method of identification; that is all that is necessary. This is a discreditable attempt to make costs; the Court is bound to see that such a practice as this is not generally adopted, and I therefore order the affidavit to be taken off the file, and the Defendants personally to pay the costs of and incident to the affidavit, including the costs of the motion.

Solicitors: *Layton & Jaques; Poole, Hughes, & Poole.*

C. W. C.

In re COLONIAL MUTUAL LIFE ASSURANCE SOCIETY.

CHITTY, J.
1882
Feb. 25.

Practice—Foreign Life Assurance Company—Return of Deposit—Accumulation Fund in Foreign Country—Life Assurance Companies Acts, 1870 *to* 1872 *—Life Assurance Companies Act*, 1870, *s.* 3—*Board of Trade Rules*, 28*th August*, 1872, *r.* 6.

On a petition by depositors under the *Life Assurance Companies Acts*, 1870 to 1872, and the Board of Trade Rules thereunder, for payment out to them of the £20,000 required to be deposited in Court by a foreign life assurance company before commencing business in this country, the Court will, having regard to rule 6 of the Board of Trade Rules, make the order notwithstanding that the *Life Assurance Companies Act*, 1870, sect. 3, enacts that the deposit shall be returned "to the company."

The life assurance fund required by that section to have been accumulated prior to the return of the deposit may consist of accumulations already existing abroad and arising from the original business of the company.

PETITION.

The *Colonial Mutual Life Assurance Society, Limited*, was incorporated on the 4th of November, 1873, at *Melbourne, Victoria*, as a limited company under the Victorian statute known as "*The Companies Statute*, 1864."

The company being desirous of carrying on the business of life assurance in the *United Kingdom*, the Petitioners, on behalf of the company, deposited a sum of £20,000 in Court, pursuant to the *Life Assurance Companies Acts*, 1870 to 1872, and the Board of Trade Rules of the 28th of August, 1872, issued thereunder.

The life assurance fund of the company accumulated out of premiums paid to the company in respect of its foreign business being largely in excess of the sum of £40,000 required by sect. 3 of the *Life Assurance Companies Act*, 1870, to have been accumulated prior to the return of the deposit, the petition prayed that the £20,000 deposit might be paid out "to the Petitioners," the depositors.

Medd, and *Leverson*, for the Petitioners, pointed out that although the 3rd section of the *Life Assurance Companies Act*, 1870, required the deposit to be returned "to the company,"

CHITTY, J. 1882 *In re* COLONIAL MUTUAL LIFE ASSURANCE SOCIETY.

yet rule 6 of the Board of Trade Rules authorized payment to the depositors "or as they direct."

They also submitted that the life assurance fund of £40,000 required by the section to have been accumulated before the return of the deposit might consist of accumulations already existing abroad and arising from the company's foreign business. It was proposed that the petition should be signed by the Petitioners, by analogy to the practice under the *Parliamentary Deposit Act* (9 Vict. c. 20).

CHITTY, J., was of opinion that the 3rd section of the *Life Assurance Companies Act*, 1870, had been sufficiently complied with, and made the order as prayed; but directed the petition to be signed by the Petitioners, and their signatures to be proved be affidavit.

Solicitor: *R. C. Want.*

G. I. F. C.

CHITTY, J. 1882 May 22.

In re MACHU.

Will—Devise—Fee simple Estate—Proviso determining Estate on Bankruptcy—Condition—Conditional Limitation—Repugnancy.

A testator devised a freehold estate to the use of his daughter, "her heirs and assigns" for her separate use "subject, nevertheless, to the proviso hereinafter contained for determining her estate and interest in the event therein mentioned." In a subsequent part of the will was a proviso that in case his said daughter should at any time be declared a bankrupt, then and thenceforth the devise thereinbefore made to her should be void, and the premises should thenceforth go, remain and be to the use of her children:—

Held, that the devise did not operate as a conditional limitation, and that the condition in the proviso was void for repugnancy; and accordingly that the daughter was entitled to the property for an absolute estate in fee simple.

THIS was a petition by *Eliza Florence*, widow, for the payment out of Court to her of a sum of £6200 paid into Court by the *Metropolitan and Metropolitan District Railway Companies* under the following circumstances:—

John Henry Machu, who died in 1879, by his will, dated in 1877, gave, devised, and bequeathed certain freehold, copyhold,

and leasehold messuages and hereditaments, including a freehold house and shop in *Great Tower Street, London*, "unto and to the use of my daughter *Eliza Florence* (the Petitioner), her heirs, executors, administrators, and assigns for her own sole and separate use . . . . subject, nevertheless, to the proviso hereinafter contained for determining her estate and interest in the event therein mentioned." And after making devises and bequests to another daughter and to his grandsons and granddaughters by name (including the three children of *Eliza Florence*), subject, nevertheless, to the proviso thereinafter contained, the testator proceeded as follows:—

"Provided always, and I hereby direct that in case any or either of my said daughters, or grandsons, or granddaughters, the said *Eliza Florence*," and the other persons named, "shall at any time or times be declared a bankrupt, or shall liquidate with his or her creditors, or shall avail himself or herself of any act for the relief of insolvent debtors, then and thenceforth and in either of such cases the devise and bequest of the said hereditaments and premises hereinbefore made unto such my daughter, grandson, or granddaughter, and also any other share or interest he or she may at any time take by virtue of this present clause, shall, as to the whole of the said hereditaments and premises hereinbefore devised and bequeathed to him or her, and also as to any such accrued share and interest as aforesaid, be void, and the same hereditaments and premises shall thenceforth go, remain, and be unto and to the use of such of his or her child or children who may not be affected by this present clause," who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, in equal shares; and, if there should be no such child or children, then unto and to the use of such of the heirs or next of kin of his said daughter, or grandson, or granddaughter as respectively should not be affected by the present clause, in equal shares.

The *Metropolitan* and *Metropolitan District Railway Companies* being desirous of taking the house and shop in *Great Tower Street* for the purposes of their Act of 1879, entered into negotiations with the Petitioner for that purpose, on the footing of the Petitioner being absolute owner in fee; but eventually, the com-

CHITTY, J. panies not being satisfied with her title, they elected to treat with her as a limited owner, on the ground that the proviso in the will purported to determine her estate in fee in certain events.

1882

In re MACHU.

The purchase-money was then ascertained under the *Lands Clauses Act* in the usual way, and the company paid the amount, £6200, into Court, whereupon the Petitioner executed a statutory conveyance of the property to the company.

The Petitioner now asked for payment out of the fund to her, submitting that the proviso was void and that she was absolutely entitled to the hereditaments specifically devised to her, free from the proviso, and was therefore absolutely entitled to the fund in Court.

Crossley, Q.C., and *Gazdar*, for the Petitioner:—

We submit that the proviso is void, on the ground that the condition in it is repugnant to and inconsistent with the prior absolute gift; for it seeks to disannex from an absolute estate a liability to alienation in the event of bankruptcy, which is a liability incidental to such an estate, and to create a species of estate unknown to the law. All the authorities upon the subject deal with the case of a life estate, not, as here, with an estate in fee; but we submit the same principle applies in both cases. The principle is that property cannot be so disposed of as to be divested of its legal incidents; and on that principle the donor cannot exempt the property disposed of from its liability to the debts of the donee. Thus, if property be given to a man for his life, the donor cannot take away the incidents of a life estate: while it is the property of the donee it must be subject to his debts; though property may be given to a man until he becomes bankrupt. There is an obvious distinction between a disposition to a man until he becomes bankrupt and then over, and an attempt to give him property and at the same time to prevent his creditors from obtaining an interest in it: *Brandon* v. *Robinson* (1); *Jarman* on Wills (2). The leading case on the subject of repugnant conditions is *Bradley* v. *Peixoto* (3), and the autho-

(1) 18 Ves. 429.

(2) 4th Ed. vol. ii. pp. 22 *et seq.*

(3) 3 Ves. 324.

rities are collected in the notes to that case in *Tudor's* Leading Cases (1).

Ince, Q.C., and *S. Stephens*, for the Respondents, the three children of *Eliza Florence*:—

We admit that if the proviso is to be read as a simple condition, it is repugnant and therefore void; but we contend that the proviso is made, by reference, a part of the gift itself, and that therefore the gift and the proviso must be read together, and not as separate clauses. If they are so read, then the proviso operates as a conditional limitation, which is perfectly good.

[CHITTY, J., referred to *Webb* v. *Grace* (2).]

That is an authority in favour of so reading this proviso. In that case there was a covenant to pay *E. C.* during her life, subject to the proviso thereinafter contained, an annuity of £40: then followed a proviso that in case *E. C.* should at any time thereafter marry the annuity should be reduced to £20. It was held to be, in effect, a covenant to pay an annuity of £40 until marriage, and afterwards an annuity of £20 only; the proviso being read as part of the original gift itself. *Kiallmark* v. *Kiallmark* (3) was a case of an absolute interest in the proceeds of sale of freehold and leasehold property, followed, as in the present case, by a condition divesting that interest on bankruptcy; and yet Vice-Chancellor *Kindersley* held that the interest went over on bankruptcy, considering that the divesting clause or condition should be read strictly.

If, as is well settled, a life estate can be cut down on bankruptcy, there is, on principle, no reason why an estate in fee cannot be limited up to and until the happening of that event. It has indeed been laid down that an absolute interest may be made to cease on an attempt to alien or incumber: *Tudor's* Leading Cases (4) and the cases there cited. And a proviso for cesser of a life interest on bankruptcy is sufficient without a limitation over: *Dommett* v. *Bedford* (5); *Joel* v. *Mills* (6);

(1) 3rd Ed. pp. 968 *et seq.*
(2) 2 Ph. 701.
(3) 26 L. J. (Ch.) 1.
(4) 3rd Ed. p. 978.
(5) 6 T. R. 684.
(6) 3 K. & J. 458.

CHITTY, J. 1882 *In re* MACHU.

Theobald on Wills (1). Here the testator's intention clearly is that the fee simple estate shall be divested on bankruptcy.

[They also referred to *Pearson* v. *Dolman* (2).]

[CHITTY, J., in the course of the argument, also referred to *Bellairs* v. *Bellairs* (3); *Rochford* v. *Hackman* (4); *Sanders* on Uses (5); and *Stephen's* Commentaries (6).]

CHITTY, J.:—

The question which I have to decide on this will is whether a proviso which purports to determine on bankruptcy an estate which has been previously limited to the Petitioner in fee is good or not.

Now the law up to a certain point is settled beyond all doubt. If an estate in fee simple is given by a will or other instrument, with a proviso which is in law a condition-subsequent defeating the estate on alienation or on bankruptcy, the condition is void. It is said that there may be a limitation to a man—not of his own property but of the property of another—until he shall attempt to alienate or become bankrupt. It is settled that such a limitation is good with reference to a life estate; but there is no express authority, so far as the researches of counsel have extended, and so far as my memory serves me, in which the point has been decided that a limitation in fee to a man until he shall alienate or become bankrupt is good. As far as the case before me is concerned, I do not think it will be necessary for me to determine the exact point. The real question is whether, on the construction of this will, there is a conditional limitation in fee to the Petitioner, with a gift over on that conditional limitation being exhausted or having expired. I use the term "conditional limitation" in the sense in which it is employed in *Sanders* on Uses and in *Stephen's* Commentaries (7), where it is said: "The term used by Lord *Coke* is simply 'a limitation.' But as 'limitation' is ordinarily used to express a more general idea (viz. the definition or circumscription in any conveyance of the interest

(1) 2nd Ed. p. 462.
(2) Law Rep. 3 Eq. 315.
(3) Ibid. 18 Eq. 510.
(4) 9 Hare, 475.
(5) 5th Ed. vol. i. pp. 155, 156.
(6) 8th Ed. vol. i. p. 295.
(7) 8th Ed. vol. i. p. 295, note (*k*).

which the grantee is intended to take), the term 'conditional limitation' better expresses the idea in the text." Then the idea in the text is this: "Estates on condition expressed in the grant may be created not only by a condition in deed, but by a *conditional limitation;* which is, where an estate is so expressly defined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail." In other words, there may be a limitation of an estate so framed as in itself to import a condition, and on the happening of the event mentioned in the condition the estate itself determines. In *Sanders* on Uses (1) the author says, with reference to these conditional limitations: "In these cases it is necessary to use words of limitation; which words are, *quamdiu, dummodo, dum, quousque, durante;* whereas words of *condition* are *sub conditione, ita quod, si contingat, proviso.*" This is more or less artificial reasoning on an abstruse point; but the principle that existed in the minds of the old lawyers is clear—they held that an estate could be limited to a person until the happening of an event, and then over, so that when the event happened the estate in that person ceased and went over; but that if a deed or will contained a devise or gift of an estate in fee simple, and then went on to state that provided something happened the estate should be defeated, that was a condition, and void because it could not operate as a remainder at common law. Therefore, in the law of real property a distinction was made between a condition pure and simple and a conditional limitation; and that distinction subsists at the present day.

If then the limitation in this will is to be construed as a limitation of an estate which in itself is so framed as to expire on the happening of an event, the Respondents would, under the gift over on the happening of that event, be entitled to succeed, subject to the one point which I have said I shall not determine, namely, whether an estate in fee simple can be subject to a conditional limitation or not.

The construction of the will does not appear to me to be open to any very great ambiguity. The gift is unto and to the use of the

(1) 5th Ed. vol. i. p. 156.

CHITTY, J.
1882
In re MACHU.

daughter, her heirs, executors, administrators, and assigns, "subject, nevertheless, to the proviso hereinafter contained for determining her estate and interest in the event therein mentioned." That is not a limitation to her until she shall become bankrupt, and then, if she shall not become bankrupt, to her, her heirs, executors, administrators, and assigns, but a limitation to her, her heirs, executors, administrators, and assigns, subject to the proviso for determining her estate. The language of the proviso shews that the testator thought, or the conveyancer who drew the will thought, that he was, in a certain event, determining the estate which he had previously given, and had expressly made or recognised as assignable. The proviso is that if the daughter, or any other of the objects who are named, shall be declared bankrupt, the devise and bequest of the hereditaments, as well as any other share he or she may take under the clause, "shall, as to the whole of the said hereditaments and premises hereinbefore devised and bequeathed to him or her . . . be void, and the same hereditaments and premises shall thenceforth go, remain and be" unto and to the use of her or her children. That is in form a clause which avoids the previous gift and avoids the prior estate which has been already limited. It cannot mean that the estate is to be wholly void, because that would be taking away the rents and profits from the devisee from the very commencement; and, moreover, the testator has expressly described and referred to this clause in the earlier part of the will, as a clause for determining the estate; and he also says, in the same clause, that the property is thenceforth to go and remain to the persons who take under the gift over.

I decline, therefore, on the construction of this will, to hold that the limitation to the daughter is a conditional limitation. I think the true effect of the will is this, that the testator has, by the proviso, imposed a condition avoiding the estate in the event of bankruptcy; and that, by the prior words of reference in the gift itself, he has only intended to refer to that condition. On principle, I cannot see the difference between giving an estate to *A.*, his heirs and assigns, followed by a proviso that if he shall become bankrupt the estate shall be void, and a gift to *A.*, his heirs and assigns, "subject to the proviso hereinafter contained," the proviso

being in the same terms. The words of reference in the gift to the proviso which comes afterwards, do not appear to me to make the slightest difference in the construction. There is some ground for saying that Lord *Cottenham* did not take this view in *Webb* v. *Grace* (1), but the question Lord *Cottenham* had to decide in that case was on a very different instrument, and he there held that the gift and the condition must be read together, and construed as a conditional limitation. The gift was in the form of a covenant to pay to *Eliza Castle*, "for and during the term of her natural life, subject to the proviso hereinafter contained, an annuity of £40; provided always, and it is hereby declared and agreed by and between the parties hereto, and it is the true intent and meaning of these presents, that in case the said *Eliza Castle* shall at any time hereafter happen to marry, then, from and immediately after her marriage, the said annuity of £40 shall be and is hereby reduced to £20 only." On the construction of the gift and the proviso, Lord *Cottenham* said it was only a gift to her for her life, first, of an annuity of £40 until she married, and subsequently of an annuity of £20. If I may say so respectfully, I think that was the true construction of the instrument. But Lord *Cottenham* had not, as I have here, to deal with a limitation to a person "her heirs, executors, administrators, and assigns, subject to the proviso hereinafter contained for determining her estate." This will would have been open to a different construction if the testator had said, "I give to my daughter the property in question for her life, subject to the proviso hereinafter contained," and had then added a proviso that "if she shall become bankrupt, I give it over to somebody else, and if she does not become bankrupt, then I give it to her in fee." That would have been a different case, and the limitation would have been good. I decline, as I have already said, to hold upon the construction of this will, that the original gift itself is of such a nature as that it can be supported as a conditional limitation.

The result, therefore, is that I hold the condition contained in the latter part of the will to be a condition pure and simple, and consequently repugnant and void. The Petitioner is accordingly absolutely entitled to the £6200 in Court, and I order it to be

(1) 2 Ph. 701.

CHITTY, J. 1882 *In re* MACHU.

paid out to her in accordance with the prayer of the petition; the railway companies to pay the Petitioner's costs according to the Act.

Solicitors: *Turner & Low.*

G. I. F. C.

CHITTY, J. 1882 *June* 19.

In re HYATT'S TRUSTS.

Trustees of Stock refusing to transfer—Vesting Order—"Sole" Trustee—Trustee Act, 1850, *ss.* 2, 23.

Having regard to the interpretation clause (sect. 2) of the *Trustee Act*, 1850, the expression "sole trustee" in the Act includes all trustees who are jointly entitled. Consequently, where two trustees of stock refused to transfer it to two new trustees duly appointed under a power:—

Held, that the Court had jurisdiction under the 23rd section to make an order vesting the stock in the new trustees.

BY a settlement dated in 1880, trusts were declared by Mrs. *Hyatt*, a married woman entitled to her separate use, of a sum of Consols which had been transferred into the names of two trustees. These trustees refused to act in any way in the trusts; whereupon, by a deed dated in February, 1882, Mrs. *Hyatt*, under a power in the settlement, appointed two new trustees, and then requested the original trustees to transfer the Consols into the names of the new trustees. The original trustees, however, still refused to act in any way in the trusts or to execute any transfer, alleging that they had been appointed trustees without their knowledge. This petition was then presented under the *Trustee Acts*, 1850 and 1852, by Mrs. *Hyatt*, her husband and the new trustees, asking for an order vesting the Consols in the new trustees. The Court made the order as prayed; but the *Bank of England* declined to act upon it on the ground that the Court had no jurisdiction to make it, inasmuch as sect. 23 of the *Trustee Act*, 1850, provided only for the case of a "sole" trustee refusing to transfer. The petition was therefore put into the paper again; and now came on for hearing.

R. F. Norton, for the Petitioners:—

I submit that, having regard to sect. 23 and the last paragraph

of sect. 2 (the interpretation clause) of the *Trustee Act*, 1850 (1), the Court had jurisdiction to make the order.

The question came before Vice-Chancellor *Parker* in *In re Hartnall* (2), and although he at first doubted whether the word "sole" could be held to include several trustees, he ultimately made the order; and on the matter being again brought before him by the *Bank of England* he adhered to his former decision.

In a case of *In re Spawforth's Settlement* (3) Vice-Chancellor *Stuart* refused to make an order under somewhat similar circumstances. But that may be explained by the fact, that, as appears from the *Law Times* report, the title of the *cestuis que trust*, who claimed to have the whole fund transferred to them, was not admitted by the trustees.

Kekewich, Q.C., for the Bank:—

The case of *In re Hartnall* is not in point. The report shews that the persons required to transfer were the executors of a last surviving trustee in whose name the stock was standing; whereas here the Consols are in the names of two existing trustees. Vice-Chancellor *Stuart* had the case of *In re Hartnall* cited to him in *In re Spawforth's Settlement*, and yet held that he had no jurisdiction. The order in the former case must have been made under the 25th section of the Act, which expressly refers to the case of stock standing in the name of a deceased person, whose personal representatives refuse to transfer it.

Norton, in reply.

CHITTY, J., stated the facts of the case and then continued:—

The bank says that the words "any sole trustee" apply only to the case of one trustee, and not to that of two or more joint trus-

(1) Sect. 23 of the *Trustee Act*, 1850, enacts that "where any sole trustee of any stock shall neglect or refuse to transfer such stock . . . . it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock in such person or persons as the said Court may appoint." And by sect. 2 of the same Act it is provided that "generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things."

(2) 5 De G. & Sm. 111.

(3) 12 W. R. 978; 10 L. T. (N.S.) 641.

CHITTY, J. 1882 *In re* HYATT'S TRUSTS.

tees. But that argument is answered by the interpretation clause, which is as follows:—[His Lordship read it.] The question came before Vice-Chancellor *Parker* in 1851 in the case of *In re Hartnall* (1). The report of the case is not free from inaccuracy, but the order was clearly asked for under the 23rd section of the Act, because counsel for the Petitioner referred to that section in contrast with the 25th section (which the report calls the 24th) and the judgment of the Vice-Chancellor clearly refers to the 23rd section. He said that "it was a strange application of the interpretation clause to hold the words 'sole trustee' to mean all the trustees where there were more than one. But, on the whole, he thought it correct." It is stated by the reporters in a note at the beginning of the volume that the Vice-Chancellor revised this, amongst other judgments, before his death. It has been also pointed out to me that the bank took exception to the order, and had the matter brought again before the Vice-Chancellor, so that he must have fully considered the question. It was said by counsel for the bank that the Vice-Chancellor's order might have been made equally well under the 25th section. That is true, because the 25th section says: "And be it enacted that when any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock or receive the dividends or income thereof," then, the Court may make a vesting order. But looking at the report, it seems plain that the order was, in fact, made under the 23rd section.

It is said that the same point came before Vice-Chancellor *Stuart* in *In re Spawforth's Settlement* (2) where there were two trustees, both of whom refused to transfer, and the Vice-Chancellor, no doubt, said that he had no jurisdiction to make the order. It appears, however, from the report of the case in the *Law Times*, that the then present trustees were only the executors of a deceased surviving trustee, and it is not perfectly clear that the fund stood in the sole name of the last trustee. And it also appears that the title

(1) 5 De G. & Sm. 111. (2) 12 W. R. 978; 10 L. T. (N.S.) 641.

of the *cestuis que trust* to receive the fund was disputed on the ground that there was litigation pending in which the Petitioners were interested, and for the costs of which the fund might be liable. It is very probable, therefore, that the Vice-Chancellor refused to make the order on that ground. At any rate, I shall follow the previous decision of Vice-Chancellor *Parker;* and I wish also to state that I consider his view of the construction of the Act to be right. There are several sections in the Act—such as sects. 9 and 11—where the word "solely" occurs, and I think that the intention of the framers of the Act was that the word "sole" should be sufficient to include all trustees who were solely entitled to any trust property. If I were to do what the bank asks, I should have to hold that there is a *casus omissus* in the Act of a very remarkable kind.

I think therefore that the order was rightly made.

Solicitors: *S. Johnson; Freshfields & Williams.*

G. I. F. C.

In re WALA WYNAAD INDIAN GOLD MINING COMPANY.

July 13, 19, 20.

Winding-up—Company—Contributory—Liquidation Petition—Trustee—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 40 [*Revised Ed. Statutes, vol. xv. p.* 631]—*Period of Six Months*—"*Held*"—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89) [*Revised Ed. Statutes, vol. xiv. p.* 202]—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 15, 94, 95, 115.

A contributory of a company may present a petition to wind up the company where his name appears on the register as the holder of shares, though a trustee may have been appointed under a liquidation petition filed by such contributory, during the period of six months mentioned in s. 40 of the Companies Act, 1867.

The word "*held*" in such section has no technical meaning, the true meaning of the word being that the name of the contributory has been on the register as the holder of shares for the period in question.

THIS was the petition of a shareholder holding 1900 shares to wind up the company.

The petition was opposed by a number of other shareholders, and a preliminary objection was raised that at the time the petition

CHITTY, J.
1882
In re WALA WYNAAD INDIAN GOLD MINING COMPANY.

was presented the shares in respect of which the Petitioner was a contributory had not been held by him and registered in his name for a period of six months during the eighteen months preceding the presentation of the petition within the meaning of s. 40 of the Companies Act, 1867.

The 40th section is as follows:—

"No contributory of a company under the principal Act shall be capable of presenting a petition for winding up such company unless the members of the company are reduced in number to less than seven, or unless the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him and registered in his name for a period of at least six months during the eighteen months previously to the commencement of the winding-up, or have devolved upon him through the death of a former holder.

"Provided that where a share has during the whole or any part of the six months been held by or registered in the name of the wife of a contributory either before or after her marriage, or by or in the name of any trustee or trustees for such wife or for the contributory, such share shall, for the purposes of this section, be deemed to have been held by and registered in the name of the contributory."

It appeared that the name of the Petitioner was placed upon the register of shareholders on the 18th of May, 1881, the company having been formed in the early part of that year. On the 26th of August, 1881, the Petitioner filed a liquidation petition, and on the 29th of September, 1881, a trustee was appointed under that liquidation. On the 28th of October, 1881, a deed of composition was executed, and on the 7th of January, 1882, the trustee in the liquidation re-assigned the shares in the company to the Petitioner. The winding-up petition was presented on the 28th of February, 1882.

Macnaghten, Q.C., and *Seward Brice*, in support of the objection:—

On the 29th of September, 1881, when the trustee in the liquidation was appointed, all the interest which the Petitioner had in

the shares passed, by virtue of his liquidation, which for this purpose is equivalent to a bankruptcy, to the trustee in the liquidation: *In re Bissell* (1); *In re Bonham* (2). Up to that time the Petitioner had been on the register for a period very little over four months, and between the date of the reassignment on the 7th of January, 1882, and the 28th of February, the date of the presentation of the petition for winding up, is a period of one month and twenty-one days. Taking the two periods together, they only amount to six months and one day. We submit that the "holding" referred to in the 40th section must be a continuous holding for a period of six months, and that it is not sufficient that the name of the shareholder should be on the register. We admit that the shares remained in the name of the Petitioner, but all his interest in them had passed to the trustee, and the "holding" which the Petitioner had was not such a holding as would qualify him to be a contributory.

[They also referred to *Billon* v. *Hyde* (3), to the *Bankruptcy Act*, 1869, ss. 11, 15, 94, 95, 125, and to *Lindley* on Partnership (4).]

Everitt, Q.C., and *McClymont*, for the company, supported the objection.

Romer, Q.C., and *Northmore Lawrence*, for the Petitioner:—

The Petitioner is on the register as the holder of the shares, and has been ever since the 18th of May, 1881. The trustee in the liquidation has never been on the register. The Petitioner is the holder of shares within the meaning of the *Companies Act*, 1862, qualifying him to be a contributory, and so enabling him to present his petition.

Ince, Q.C., *Crossley*, Q.C., and *Beddall*, appeared for other parties, but took no part in the argument.

Macnaghten, in reply.

CHITTY, J.:—

The question raised is, whether the Petitioner is capable of

(1) Law Rep. 6 Ch. 605.
(2) 10 Ch. D. 595.
(3) 1 Ves. Sen. 327.
(4) 4th ed. vol. ii. p. 1132.

CHITTY, J.
1882
In re WALA WYNAAD INDIAN GOLD MINING COMPANY.

presenting a petition, and the argument has turned on the meaning of the 40th section of the *Companies Act*, 1867. The words are, to read them shortly, "No contributory shall be capable of presenting a petition unless (to take a particular case) the shares in respect of which he is a contributory, or some of them, either were originally allotted to him or have been held by him and registered in his name for a period of at least six months during the eighteen months previous to the commencement of the winding-up." The question is, whether this petitioner has within the meaning of that section "held," as the registered owner of shares, the shares in respect of which he is a contributory for a period of at least six months during the eighteen months previous to the commencement of the winding-up, which in this case would be the presenting of the petition.

Now Mr. *Macnaghten*, who argued the case most ingeniously, insists that the meaning of the word "held" is held so as to qualify him to be a contributory. Now, to begin with, I will just go through one or two sections of the principal Act and see how the case would have stood apart from this section. Under the 82nd section, the persons who may petition are, amongst others, "contributories." It is quite plain that this petitioner, if it had not been for the 40th section of the Act of 1867, could have presented the petition. It is quite plain he is a contributory at the present moment. It is quite plain that he was a contributory at the time when he presented this petition. His name has been on the register for a period preceding the commencement of the winding-up considerably more than six months.

Now what is the meaning of the word "held"? I think that the word "held" there has no specific technical meaning. I think it is sufficient that the shares have been registered in the contributory's name at the period mentioned, and that if they have been registered within the meaning of the two Acts of Parliament, which I am entitled to read together, it must be said that the shares are "held" by him for that period. The 25th section of the Act of 1862, which requires a register of members to be kept, uses the term "held" with reference to the shares which appear against a member's name on the register. The words which occur in sub-sect. 1 of that section are "the names and

addresses," &c. of the members of the company with the addition, in the case of a company having a capital divided into shares, of a statement of the shares "held" by each member. That plainly shews that the term "held" has no specific force, but shares are held by the person in whose name they are registered.

Then there is the 26th section, in which similar terms occur. "The number of shares 'held' by each of them," which means simply the number of shares in respect of which they appear on the register. There are other sections which I will not refer to in which the term "held" is used, and used as I consider in that sense only.

Table A, which I merely refer to for the purpose of elucidating this proposition, uses the term "holder" and "held" not infrequently, and in no other sense except the sense of a registered owner. I will take one or two of the articles of table A for instance. Article 1 speaks of several persons "registered as the joint holders;" article 2 specifies the shares "held" by him. I take these as illustrations. There are many others, for instance in article 9, where the form of transfer is given "subject to the several conditions on which I 'hold' the shares." There are other articles to the same effect. Take 27 as to offering the shares to members, where the term "held" also occurs. I believe there are several others, but I do not think it necessary to refer to them. In the particular articles before me, I find similar expressions. Take article 72: "Every shareholder shall have one vote for every entire number of five shares 'held' by him." That plainly means those shares which stand in his name on the register. Nothing can be more plain than that. No one can vote at a meeting where the company's capital is divided into shares except those who are on the register as holders of shares. Article 74 also has the same expression, "The shares which if 'held' by one person" and so on. I think then that the true meaning of the word "held" in the 40th section of the Act of 1867 is simply that the contributory has had his name upon the register as the holder of the shares for the period in question. That really decides the case. I should say it is very likely that in drawing this section the mind of the draughtsman was alive to the sections under which the shares might pass to bearer, and it was

CHITTY, J. 1882 *In re* WALA WYNAAD INDIAN GOLD MINING COMPANY.

seen that if the term "held" by him was used simply there would have been a question whether the holder of shares to bearer could present a petition. Therefore it appears to me that the words "and registered" were added in order to preclude such a shareholder from presenting a petition. I use now myself the term which is common in the Courts, "a shareholder," that means the holder of the shares. It is the common term used, and only means the person who holds the shares by having his name on the register. It is unnecessary therefore to consider the grammatical questions which have been raised and argued with a great deal of skill by Mr. *Macnaghten*. It is unnecessary also to my mind to go into the question of the *Bankruptcy Act*, and the more or less minute questions that have been raised with reference to the position of this gentleman. It is, however, my opinion that a person who is bankrupt at the time he presents a winding-up petition could not maintain the petition on the ground that he is not a contributory by virtue of the 77th section, because, as I have stated, under the 82nd section of the Act of 1862 it is only a contributory who can present a petition.

I may add that in the proviso in the 40th section, which no doubt only relates to marriage, the terms are "held by or registered," evidently shewing that in the mind of the Legislature there is no distinction between the two for this purpose. The term "registered" is the stronger term of the two.

The result therefore is that I overrule the preliminary objection.

The petition was then heard upon the merits, and a winding-up order was made.

Solicitors: *Michael Abrahams & Co.; Beall & Co.; H. Montagu; F. D. Thompson; Robins & Cameron; A. T. H. Evans, Manchester.*

G. M.

In re SUTTON.

NORTH, J.

1882

April 22.

Practice—Petition—Trustee Relief Act (10 & 11 *Vict. c.* 96) [*Revised Ed. Statutes, vol. x. p.* 277]—*Trustee—Tender of* 42*s.—Costs of Appearance—Rules of Court*, 1875 (*Costs*), *Sched. r.* 17.

Trustees who are Respondents to a petition under the *Trustee Relief Act* for payment of a fund out of Court, and have been tendered and have accepted 42*s.* for their costs under Rules of Court, 1875 (Costs), Sched. r. 17, are not, as a general rule, entitled to their costs of appearance on the petition.

THIS was a petition for the payment out of Court of a fund paid in by two trustees under the *Trustee Relief Act* by reason of the want of representation to the person whose estate was absolutely entitled to the fund.

The trustees were made Respondents to the petition, and had been tendered 42*s.* for their costs under Rules of Court, 1875 (Costs), Sched. r. 17 (1), the tender being accompanied by the usual notice of objection to their appearance at the hearing. The trustees accepted the 42*s.*, at the same time intimating their intention to appear at the hearing. They accordingly appeared by counsel, and the question was whether they were entitled to their costs of such appearance.

Chubb, for the Petitioner:—

I submit the trustees are not entitled to their costs of appearance. Under the old practice, if a petitioner served the petition on the respondent and at the same time offered him 40*s.* to enable him to get legal advice, and the respondent afterwards appeared, the Court considered whether the appearance was justified or not,

(1) The rule is, so far as is material, as follows:—"Where a petition in any cause or matter assigned to the Chancery Division is served, and notice is given to the party served that in case of his appearance in Court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be £2 2*s.* The party making such payment shall be allowed the same in his costs, provided such service was proper, but not otherwise; but this order is without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled, notwithstanding such notice or tender, to appear in Court."

NORTH, J. 1882 *In re* SUTTON.

and, if not, it would not allow the costs of appearance: *In re Duggan's Trusts* (1). I submit that the same practice should prevail now, and that in such a case as this there is no justification for the trustees' appearance.

J. G. Wood, for the trustees:—

The rule expressly reserves the rights of parties who the Court considers are entitled, notwithstanding the notice or tender, to appear; and I submit that a trustee is entitled to appear upon a petition under the *Trustee Relief Act* relating to his trust fund, and therefore ought to be allowed his costs of appearance.

NORTH, J.:—

In the absence of any authority to the contrary, I decline to give the trustees their costs of appearance.

The rule that has been referred to appears to me to govern the case exactly. I do not see any reason why, under a petition of this nature, a trustee should have more than the 42*s.* tendered to him, and which, in the present case, has been accepted. I have consulted the Registrar upon the subject, and he is unable to furnish me with any authority that, notwithstanding the receipt of the 42*s.*, a trustee is entitled merely to come and ask for his costs of appearance. If he comes to give the Court any information he is entitled to his costs; but not so if he comes merely to ask for his costs.

Solicitors: *Whitehouse & Etherington; Sutton & Omnanney.*

(1) Law Rep. 8 Eq. 697.

G. I. F. C.

MARTINSON *v.* CLOWES.

NORTH, J.

1882

June 16, 17, 19, 24.

[1880. M. 0648.]

Sale by Mortgagees—Purchase by Secretary of Mortgagees.

At a sale by auction under the direction of a building society as mortgagees, the secretary of the society openly bid for and became the purchaser of two lots on his own account. There was no proof of undervalue.

Held, that under the circumstances the sale to the secretary could not be maintained as against the mortgagor.

Robertson v. *Norris* (1) disapproved of.

THIS was an action by a mortgagor, *Lucy Martinson* (who after the action was begun obtained an order to sue *in formâ pauperis*) against one *Clowes*, and against the *Norwich and Norfolk Building Society*, her mortgagees, and against purchasers from them, praying to have certain sales of houses made by the society under their power set aside, and for redemption. Several questions were raised in the case, especially relating to sales to persons named *Bradbeer*, *Nicholls*, and *Culley*, but the only question requiring a report was as to the validity of the sales to *Culley*, who was the secretary of the building society. The facts relating to that sale are fully stated in the judgment of the Court.

Fischer, Q.C., and *Terrell*, for the Plaintiff, contended that the sales had been for an undervalue: *Ex parte Lacey* (2); and the purchasers were connected with the mortgagees; at all events their biddings deterred others. *Culley*, the secretary of the building society, was the principal purchaser. Such purchases could not be maintained: *Downes* v. *Grazebrook* (3); *Guest* v. *Smythe* (4); *Whitcomb* v. *Minchin* (5).

Higgins, Q.C., and *Knipe*, for *Clowes*, a Defendant, referred to *Warner* v. *Jacob* (6).

(1) 1 Giff. 421.
(2) 6 Ves. 625.
(3) 3 Mer. 200.
(4) Law Rep. 5 Ch. 551.
(5) 5 Madd. 91.
(6) 20 Ch. D. 220.

NORTH, J.
1882
MARTINSON
v.
CLOWES.

Cozens-Hardy, Q.C., and *P. Beale*, for the building society.

Bush, for *Culley*.

Rigby, Q.C., *Owen*, *C. Healey*, and *Church*, for other Defendants.

Fischer, in reply, referred to *Lewin* on Trusts (1) and to *Tennant* v. *Trenchard* (2).

NORTH, J., delivered judgment on some of the points which had been argued, but reserved his judgment as to the houses purchased by *Culley* and *Nicholls*.

June 24. NORTH, J.:—

The point upon which I reserved my decision was as to the relief asked in respect to the five houses numbered as Lots 1, 2, 3, 4, and 6 at the sale by the building society, which took place on the 24th of April, 1879. The material facts as proved or admitted seem to me to be shortly as follows: The building society were mortgagees selling under a power of sale, and in the month of September, 1878, they put up for sale these five houses and another house, together with some other property, the reserved price for the six houses being fixed by resolution of the directors at £2000. No part of the property was then sold, as it was all withdrawn under circumstances of which the Plaintiff's counsel made considerable complaint, but which the auctioneer who was called by the Plaintiff as her witness proved to have been the best course which could be adopted.

Part of the property having in the meantime been disposed of by private contract to a person named *Bradbeer*, the residue was again offered for sale by auction on the 24th of April, 1879. At that time the Defendant *Culley* was and had been for five years the secretary of the society, and the Defendant *Stevens* was the society's solicitor. On this occasion the reserved price put upon each house was £300, which price was fixed by the directors as on the previous occasion. The Defendant *Culley* admits by his

(1) Chap. xviii. § 3.

(2) Law Rep. 4 Ch. 537.

affidavit that "in conjunction with the solicitors of the society he instructed the auctioneer," and he states in his evidence that he personally took the instructions for sale to the auctioneer and told the latter what the reserved bids were to be.

What passed at the sale was shortly as follows: when the first lot was put up, some four or five bids were made, the last being £300; a pause then occurred and some question was asked as to the title to the property; and after a little discussion, in which *Bradbeer* and *Stevens* both said that the title was good, the Defendant *Culley* asked the auctioneer if he could properly bid, and receiving his assent, made a bid of £320. The auctioneer then asked if he bid on his own account, and the Defendant *Culley* said, Yes. The auctioneer then said that he would take the bid; that *Culley*, though an officer of the society, was not buying as such, but was bidding for himself, that his offer was *bonâ fide;* and that the lot was "before the room," meaning that the reserve price had been reached, and that the property would be sold to the highest bidder. It is admitted that it was a matter of notoriety that *Culley* was secretary to the society, and was well known to be such by the persons present. The auctioneer waited and invited bids; but no other bid was made and the lot was, after some time, knocked down to *Culley* at £320. It is stated that the same course was followed as to Lots 2, 3, and 4; there were biddings up to £300 in each case but no further, and then *Culley* offered £320 and the lot was knocked down to him. Lot 5 was put up in the same way, but a person present bid £320 and the lot was knocked down to him at that price. Lot 6 was bought by *Culley* in the same manner and at the same price as Lots 2, 3, and 4. As to three of the houses *Cully* afterwards gave them up and *Nicholls* became the purchaser.

The Plaintiff seeks by her statement of claim to have these sales to *Culley* and *Nicholls* set aside upon the ground that the houses were sold for far less than the real value, that *Nicholls* was a mere trustee or agent for *Stevens*, that the purchases by *Culley* were not real purchases but were merely made on behalf of the building society, the vendors, by the instructions of *Stevens*, their solicitor conducting the sales. These allegations, other than that

NORTH, J. 1882 MARTINSON v. CLOWES.

as to value, which I pass by for the moment, are wholly unproved, and in my opinion are unfounded; and the title to relief rested upon them wholly fails.

But this does not exhaust the case against *Culley*, for he was, as was well known, secretary of the society, acting for them in the matter of the sale; he bid for and purchased part of the property; and it does not appear that any person bid against him in respect of any of the lots knocked down to him. The law as to the position of a mortgagee exercising a power of sale is in my opinion correctly laid down by Mr. Justice *Kay* in *Warner* v. *Jacob* (1). The language of Vice-Chancellor *Stuart* in the case of *Robertson* v. *Norris* (2) no doubt goes considerably further in treating the mortgagee as a trustee; but that language goes beyond anything to be found in the cases relied upon as authorities for it, as was pointed out by the Court of Appeal in the recent case of *Nash* v. *Eads* (3).

It is quite clear that a mortgagee exercising his power of sale cannot purchase the property on his own account, and I think it clear also that the solicitor or agent of such mortgagee acting for him in the matter of the sale cannot do so either. This seems clear from the cases cited in the course of the argument and from *Whitcomb* v. *Minchin* (4). It is admitted that *Stevens*, the solicitor, could not have himself become the purchaser of the property, and I do not see any ground for drawing a distinction between his case and that of *Culley*, who knew all the circumstances attending the sale, and admits that in conjunction with the solicitor he instructed the auctioneer. In the present case all competition for the property came to an end when *Culley* bid, and I do not think that the announcement that he was buying on his own account makes any difference in the case. I am unable to appreciate the effect which such a statement might produce upon the audience, and under the circumstances I am of opinion that *Culley* cannot maintain his purchase. There must be a declaration that the sale and conveyance to him are void as against the Plaintiff: and they must, in the event of the Plaintiff redeeming,

(1) 20 Ch. D. 220.
(2) 1 Giff. 421.
(3) 25 Sol. J. 95.
(4) 5 Madd. 91.

be set aside. But though I think that the sale to *Culley* ought to be set aside, I do not impute to him any intention to act unfairly or dishonourably in the matter.

As regards the Defendant *Nicholls*, the case is, in my opinion, wholly different. He had nothing to do with the sale, nor was he standing in any fiduciary relation as agent or otherwise to the mortgagees. It is said by Mr. *Fischer* that he was not a *bonâ fide* purchaser from *Culley*, but was merely substituted for him and stands in his place. In my opinion he was not a purchaser from *Culley* at all. *Culley's* agreement as to these three houses was abandoned with the consent of his vendors, as shewn by their entering into the contract with *Nicholls*, and *Nicholls* bought direct from the society. The Plaintiff has not proved that *Nicholls* bought at an undervalue; he bought at the same price as *Bradbeer*, the sale to whom is not impeached, for though he is named as a Defendant, the pleadings ask no relief against him. Moreover, if the sale to *Nicholls* were at an undervalue, it would not affect him, a *bonâ fide* purchaser, unless it were shewn that such sale to him was fraudulent and he was privy to the fraud. In my opinion the case against *Nicholls* wholly fails.

I am asked to charge the building society with the net values of the properties conveyed to *Bradbeer* and *Nicholls* respectively, instead of the prices actually received in respect of the same, but though these sales were by private contract, I see no ground for impugning them, or holding that they were improper as to price or otherwise, and I did not call upon the building society's counsel on this point.

I did not call upon counsel for *Stevens*, as there was no case for him to answer. The case set up against him was based upon an alleged state of facts which never really existed.

As against the Defendants *Stevens*, *Nicholls*, and *Bradbeer*, the action will be dismissed with costs down to the dates when they were respectively served with the order of the 18th of June, 1881, giving the Plaintiff liberty to prosecute her suit *in formâ pauperis*, and without costs after that date. As regards *Culley*, I cannot give him any costs, nor do I make him pay any. He must bear his own costs in any event.

The decree will declare that the sale and conveyance of Lots 1

NORTH, J. 1882 MARTINSON v. CLOWES.

and 2 to *Culley* is not valid or binding as against the Plaintiff. If the Plaintiff does not redeem, the action will be dismissed. If she does redeem by paying what is found due from her, the property unsold will be reconveyed to her, and the Defendant *Culley* must join in the reconveyance.

Solicitors for Plaintiff: *G. S. & H. Brandon.*

Solicitors for Defendants: *Johnson & Master*, agents for *Coaks & Co., Norwich; Sharpe, Parkers, & Co.*, agents for *Miller & Co., Norwich; Crowdy, Son, & Tarry*, agents for *E. E. Blyth, Norwich; Keen & Rogers*, agents for *Seago & Son, Lowestoft; Digby & Jones*, agents for *Digby & Evans, Maldon.*

C. M.

NORTH, J. 1882 *April* 24.

LEWIS *v.* TRASK.

[1880 L. 0655.]

Practice—Administration Action—Trustee—Breach of Trust—Bankruptcy—Costs.

Where the trustee of a settlement became bankrupt shortly after the commencement of an action for the execution of the trusts, and an order was made for payment by him into Court of a sum of money certified to be due from him to the estate, he was held entitled to his costs of the action, though he was not to receive them until he had made good his default.

Bowyer v. *Griffin* (1) considered.

Part 8 pp 23 Ch D 197-8 202 L. 4 25 Ch D 177

FURTHER CONSIDERATION.

This was an action by the *cestuis que trust* of a settlement against the two trustees for the execution of the trusts and for the appointment of new trustees. Part of the trust funds had been lost through an improper investment by the Defendant *Trask*, who was the acting trustee of the settlement.

Shortly after the commencement of the action the Defendant *Trask* was adjudicated bankrupt, and a trustee of his estate was duly appointed.

By the judgment in the action, dated the 11th of December, 1880, various inquiries were directed, including inquiries as to

(1) Law Rep. 9 Eq. 340.

Followed in Re Basham, Hannay v Basham 23 Ch D 195 Chitty J

what was due from the Defendant, in respect of his breach of trust; and in reply to these inquiries the Chief Clerk certified that there was due from him to the estate a sum of about £1680. Under an order in the action two new trustees of the settlement were appointed, and they and the trustee in bankruptcy were added as Defendants.

Upon the action now coming on upon further consideration, it was proposed to take an order for payment into Court by the Defendant, *Trask*, of the sum found due from him; but the question arose whether he was entitled to his costs of the action incurred since his bankruptcy.

Maidlow, for the Plaintiffs, submitted that the Defendant *Trask* could not be entitled to receive any costs until he had made good his default.

E. S. Ford, for *Trask* and his trustee in bankruptcy, submitted that it was the settled practice to allow a defaulting trustee his costs, incurred since his bankruptcy, of an action for the execution of the trusts: *Turner* v. *Mullineux* (1); *Bowyer* v. *Griffin* (2); *Morgan* and *Davey* on Costs (3); *Seton* on Decrees (4).

E. J. Elgood, for the two new trustees.

Maidlow, in reply:—

The cases cited were under the *Bankruptcy Act*, 1861, under which the trust debt could be barred by the bankrupt trustee obtaining his certificate. But under the *Bankruptcy Act*, 1869, s. 49, he remains liable for his breach of trust, even after his order of discharge.

In *Turner* v. *Mullineux* the bankrupt was executor as well as trustee; and in the more recent case of *Bowyer* v. *Griffin*, where he was trustee only, it was a mere money demand which could not be made against him personally, but against the trustees of his composition deed. But in the present case it is not disputed that an order for payment can be made against the trustee personally, as I now ask. I submit, therefore, that he ought not

(1) 9 W. R. 252.
(2) Law Rep. 9 Eq. 340.
(3) 2nd ed. pp. 342, 399.
(4) 4th ed. p. 482.

NORTH, J. to receive any costs until he has made good his default by paying the money into Court in compliance with that order.

1882

LEWIS v. TRASK.

NORTH, J.:—

23 Ch D 202

I will make an order directing the Defendant *Trask* to pay into Court the sum found due from him. I will also make an order for payment of his costs out of the estate; but he is not to have them paid until he makes good the moneys due from him to the estate. With regard to the case of *Bowyer* v. *Griffin* (1), I shall only follow it to this extent—that the trustee may have his costs after he has paid into Court the sum in which he is in default. Otherwise I do not think that case applies to the present, because there was no money due from the trustee to be paid into Court, whereas in the present case there is a sum due and an order for its payment into Court (2).

Solicitors: *Stocken & Jupp; Warry, Robins, Burges, & Co.*

(1) Law Rep. 9 Eq. 340.
(2) But see *Clare* v. *Clare*, *post*, 865.

G. I. F. C.

CLARE *v.* CLARE.

V.-C. H.

1882

[1878. C. 217.]

April 29; *May* 1, 5.

Administration — Executor — Defaulting Trustee, Bankruptcy of — Costs of Trustee subsequent to Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict.* c. 71), s. 49.

In an administration action one Defendant was an executor. He was a defaulting trustee under a settlement. After the action was commenced he was adjudicated bankrupt, and a trustee in bankruptcy was appointed and made a Defendant:—

Held, that the defaulting trustee was entitled to be paid his costs incurred after his bankruptcy.

Bowyer v. *Griffin* (1) followed.

THIS was an action for the administration of the estate of *Thomas Clare*, deceased. The usual order for administration was made on the 28th of June, 1878. *Samuel Spencer*, one of the Defendants, was an executor of the will of *Thomas Clare*, whose daughter he had married.

On her marriage there was a settlement of a sum of £1200 secured by a bond, which was executed by *Thomas Clare* and another person for whom he was surety.

S. Spencer was tenant for life under the settlement. The interest accruing on the £1200 was paid to him, and also the principal sum when the bond was paid off by the actual debtor after *Thomas Clare's* death. Subsequently to the commencement of the action he was adjudicated bankrupt, and the estate of *Thomas Clare* was called upon by the trustees of the settlement to pay the sum which was owing by *S. Spencer* in respect of the above sum. The trustee in bankruptcy was by an order dated the 25th of November, 1878, made a Defendant. *S. Spencer* was retained as a party.

The Chief Clerk on the 1st of February, 1882, made his certificate.

The action now came on to be heard on further consideration.

The question was whether *S. Spencer* was or was not entitled to

(1) Law Rep. 9 Eq. 340.

V.-C. H. 1882

CLARE v. CLARE.

be paid his costs, charges, and expenses which had been incurred subsequently to his bankruptcy.

Warmington, for the Defendant *Spencer*, submitted that he being an executor was properly retained as a party to the action after his bankruptcy, and was therefore entitled to be paid his costs as from the date of the bankruptcy though he was a defaulting trustee. As executor he was retained as a Defendant in order to assist in giving all the information he could in the administration of the estate. The bankruptcy had deprived him of his own estate, and he ought not to be refused his costs out of the estate which he represented. The case was clearly within the principle laid down in the decisions in *Samuel* v. *Jones* (1), *Cotton* v. *Clark* (2), and *Bowyer* v. *Griffin* (3).

W. Pearson, Q.C., and *Maidlow*, for the Plaintiffs:—

Since the passing of the *Bankruptcy Act* of 1869 the rule of law has been altered, and therefore the cases referred to do not apply. Mr. Justice *North* held in the case of *Lewis* v. *Trask* (4), that in effect the decision in *Bowyer* v. *Griffin* was not now law, as the defaulting trustee was only to have his costs provided he first paid into Court the amount in which he was in default, and in *Lewin* on Trusts, where *Bowyer* v. *Griffin* was referred to, there were observations to that effect, the statute being cited for them. The Defendant *Spencer* ought not to be allowed these costs.

Robinson, Q.C., as *amicus curiæ*, referred to the case of *Smith* v. *Dale* (5), where the Master of the Rolls allowed an executor who was a debtor to the estate his costs incurred subsequently to his bankruptcy.

W. Pearson, Q.C.:—One question in that case was whether the decision in *Watson* v. *Row* (6) was correct, and the point now raised was not discussed. The *Bankruptcy Act* of 1869, and the case of *Bowyer* v. *Griffin* were not referred to.

(1) 2 Hare, 246.
(2) 16 Beav. 134.
(3) Law Rep. 9 Eq. 340.
(4) *Ante*, p. 862.
(5) 18 Ch. D. 516.
(6) Law Rep. 18 Eq. 680.

Eddis, Q.C., and *Renshaw*, were for Defendants in the same interest as the Plaintiffs.

Mitchell, for two other Defendants in the same interest.

Kekewich, Q.C., and *Ingle Joyce*, for the trustees of the settlement, and *Dunning* for the trustee in bankruptcy.

Warmington, in reply, said that the *Bankruptcy Act* of 1869 did not affect the question. The case of *Cobham* v. *Dalton* (1) might be referred to as an authority in favour of the Defendant, and the decision in *Smith* v. *Dale* (2) certainly was.

HALL, V.C., after making inquiries as to the case and the decision in *Lewis* v. *Trask* (3), said that the practice since the *Bankruptcy Act* 1869, in regard to the costs of a defaulting trustee or executor, who remained a party to an action after he became bankrupt, did not appear to be settled, but notwithstanding the provisions of the statute by which a defaulting trustee was not now relieved from liability, he should follow the decision in the case of *Bowyer* v. *Griffin* (4), as it seemed to him to be consistent with good sense to hold that any person, who, though adjudicated bankrupt, was retained as a party to an action, as executor or trustee, should be paid his costs. In *Smith* v. *Dale* the costs in full from the date of the bankruptcy were given to both the solvent executor and the defaulting executor who had become bankrupt, and he should hold until the law was declared to be otherwise, that a defaulting trustee or executor properly appearing as a party to an action was as from the date of his bankruptcy entitled to be paid his costs.

Solicitors: *Power, Andrew, & Wood; R. H. Nettleship; Gush & Phillips; Billinghurst & Wood; Gregory, Rowcliffes, & Co.*, agents for *Hellard, Stogumber, Somerset.*

(1) Law Rep. 10 Ch. 655.
(2) 18 Ch. D. 516.
(3) *Ante*, p. 862.
(4) Law Rep. 9 Eq. 340.

T. F. M.

C. J. B.

1882

June 26.

In re WEST. *Ex parte* GOOD.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), s. 22—*Bankruptcy Rules*, 1870, *r.* 110—*Books of Account of the Bankrupt.*

13 Ch D 619

A *bonâ fide* purchaser for value of the book-debts, books, and all the interest in the partnership of his partner prior to a dissolution, will not be compelled upon the subsequent bankruptcy of such late partner to hand over to the trustee the books of account which passed by the assignment, and thereupon ceased to be property of the bankrupt within the meaning of the *Bankruptcy Act*, 1869, s. 22, and Bankruptcy Rules, 1870, r. 110.

THIS was an appeal from the *Greenwich* County Court raising the question whether the trustee in bankruptcy was entitled to have books of account which had been assigned for value by the bankrupt more than a year before the bankruptcy, delivered up by the assignee.

Albert West, the bankrupt, who was formerly in partnership with Messrs. *Tilson & Byrne-Jones*, solicitors, under the firm of *West, Tilson, & Byrne-Jones*, by an indenture dated the 20th of January, 1881, in consideration of £1000, assigned to *W. Byrne-Jones*, his executors, administrators, and assigns, all the beneficial interest, goodwill, share of book and other debts, bills of costs, furniture, and other assets of him the said *A. West* in, to, or about, or in any way connected with the business of the said firm of *West, Tilson, & Byrne-Jones ;* and also all the bills of costs, book and other debts, books, bonds, and papers of the said *A. West* in respect of the said business; and all the private securities belonging or due to him the said *A. West*.

The partnership was shortly afterwards dissolved, and the books remained in the possession of *William Byrne-Jones*.

In March, 1882, *West* became bankrupt, and *J. D. Good* was appointed trustee in the bankruptcy.

On the 17th of April, 1882, *Good* applied at the office of *Tilson & Byrne-Jones* for delivery to him of the books of account formerly in the bankrupt's possession. Mr. *Byrne-Jones* produced the books, and stated that he was willing to give the trustee any information he required, but claimed to retain possession of the

books as having passed to him by the assignment of January, 1881.

A motion by the trustee in the *Greenwich* County Court for an order on Messrs. *Tilson & Byrne-Jones* for delivery up to him of "two books of account formerly kept by the bankrupt, being respectively a ledger and a cash-book," having been dismissed with costs, the trustee now appealed from this dismissal.

J. E. Linklater, for the trustee in liquidation, in support of the appeal:—

We claim delivery of these two books of account under rule 110 of the Bankruptcy Rules, 1870, which was intended to be in aid of sect. 22 of the *Bankruptcy Act*, 1869. It may be inconvenient to the purchaser of the bankrupt's property to part with the books, but, on the other hand, it is necessary for the trustee, whose right under the Act and Rules is higher than any that could have been asserted by the bankrupt himself, to obtain possession of these books in order to realise the bankrupt's estate.

Sidney Woolf, for the Respondent:—

The books in question were not "books of account of the bankrupt" within the meaning of rule 110. More than a year before his bankruptcy *West* assigned these books and all his interest in the partnership to *Jones* for valuable consideration. It is not suggested that there was any fraud or bad faith in the transaction; the books, therefore, have ceased to be the property of the bankrupt, and *Jones*, who has purchased and paid for them, cannot be called upon either under rule 110 or under sect. 22, to deliver them up to the trustee.

BACON, C.J.:—

In my opinion neither sect. 22 of the *Bankruptcy Act*, 1869, nor rule 110 of the Bankruptcy Rules, 1870, furnish the least ground or reason for this application. What are the facts? A man had a certain interest in a partnership business, and assigned all that interest, of whatever nature and kind it was, for £1000. I must assume that the money was duly paid, as I have heard

C. J. B. 1882 *In re* WEST. *Ex parte* GOOD.

no suggestion to the contrary, or that the transaction was not entered into in perfect good faith and for valuable consideration. That took place in January, 1881, so that the bankrupt from that date has parted with all his property which he had in the books and in the book-debts and all other interest which he had in the partnership. The result is that it ceased to be the bankrupt's property at all. Sect. 22 is very plain: "The trustee shall, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other property capable of manual delivery." None of these book-debts and books were any longer the property of the bankrupt, for he had sold them. Rule 110 is equally explicit: "No person shall be entitled as against the trustee to withhold possession of the books of account of the bankrupt, or to claim any lien thereon." That applies to the accountant or solicitor in whose hands the property of the bankrupt may have been deposited upon his bankruptcy, and all that the Act of Parliament and the Rule say is that possession of the bankrupt's books, &c., is not to be withheld so as to defeat the right of the trustee, and that no lien, however strong, shall prevent him from having access to the books of the bankrupt. That is consistent, reasonable, and right. Upon application being made the assignee states that he is ready to give the trustee any explanation that he may require and also inspection of the books and documents, and he does in fact permit the trustee to see them. Having regard to sect. 22, and to rule 110, I am bound to say that I have not heard any reason why a man should part with property which he bought and paid for in perfect good faith long before the bankruptcy of the person from whom he bought it. The appeal must be dismissed with costs.

Solicitors: *William Crook; Tilson & Byrne-Jones.*

F. G. A. W.

In re HEWER. *Ex parte* KAHEN.

C. J. B.
1882
July 10.

Bill of Sale—Registration—"True Copy"—Clerical Error—Description of Residence of Maker—Order and Disposition—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10 (*sub-s.* 2), 20—*Bankruptcy Act*, 1869, *s.* 15, *sub-s.* 5.

I. During the period of seven days between the making and registration of a bill of sale, the order and disposition clause (*Bankruptcy Act*, 1869), s. 15, sub-s. 5, does not apply to the goods and chattels comprised in the bill of sale, so that as against the trustee in bankruptcy, who by the receiver has before the expiration of the seven days taken possession of such goods, the bill of sale holder is entitled.

II. A "true copy" of a bill of sale within the *Bills of Sale Act*, 1878, s. 10, sub-s. 2, must not necessarily be an exact copy, so long as any errors or omissions in the copy filed are merely clerical and of such a nature that no one could be thereby misled.

III. The description of the residence of the maker of a bill of sale required by the *Bills of Sale Act*, 1878, s. 10, sub-s. 2, to be stated in the affidavit filed therewith, is not rendered incorrect so as to avoid the bill of sale, by the fact that between the execution of the bill of sale and the date of the affidavit the maker had left his residence, as described in the affidavit, for *America*.

Button v. *O'Neill* (1) distinguished.

JOHN HEWER, the bankrupt, carried on business as a publican at the *North Devon Inn*, *Paul Street*, *Exeter*, and on Wednesday, the 5th of April, 1882, committed an act of bankruptcy by absconding to *America*, having on Monday, the 3rd of April, obtained £100 on the security of a bill of sale from *Leopold Kahen*, a money-lender, under the following circumstances:—

It appeared that on Friday, the 31st of March, *Kahen*, at the request of *Hewer's* father-in-law, called on *Hewer*, who told him that he wanted to borrow £150 in order to buy hops and stock, and was prepared to give a bill of sale as a security. On Monday, the 3rd of April, *Kahen* instructed a valuer to see and value the goods and chattels, and, upon the valuer's report that the goods were worth £278, agreed to advance £100, repayable by instalments in thirteen months, for a bonus of £50. In the afternoon of the same day the bill of sale was executed by *Hewer* at the

(1) 4 C. P. D. 354.

C. J. B. 1882 *In re* HEWER. *Ex parte* KAHEN.

office of Mr. *Brown*, a solicitor, who read and explained it to him, and thereupon *Kahen* paid *Hewer* £100 by cheque without any deduction.

The bill of sale, which purported to be made in consideration of £100 by *Kahen* paid to *Hewer*, comprised all furniture, fixtures, utensils, &c., and other goods, chattels, and effects belonging to *Hewer* in and about the brewing-house, and dwelling-house, and premises of *Hewer*, known as the *North Devon Inn*, 53, *Paul Street*, *Exeter*, with a proviso for redemption on payment of £150, "by twelve consecutive monthly instalments of £10 each, such payments to be made on , the first instalment to become due and payable and be made on the 3rd day of May, 1882, and the remaining balance to be paid on the nineteenth (*sic*) month from such last mentioned date."

The affidavit of the attesting solicitor, sworn on the 6th of April, and filed with the bill of sale, which was registered on the 8th of April, stated that "The said *John Hewer* resides at the *North Devon Inn*, No. 53, *Paul Street*, *Exeter*, and is a licensed victualler."

On the morning of the 5th of April, *Hewer*, who had a week or ten days before taken his passage with a woman for *New York*, left *Exeter* for *Southampton* without any notice to his wife, and, as appeared from a letter received from him next day, embarked for *New York* the same night with his companion.

On the 6th of April a petition of bankruptcy, on which *Hewer* was on the 14th of April adjudicated bankrupt, was presented by creditors, and on the same afternoon a receiver and manager was appointed, who at once took possession of the bankrupt's effects, and on the 1st of May was appointed trustee.

After possession was thus taken by the receiver, possession was purported to be taken, or was demanded, on behalf of *Kahen* on the same day, and on the 14th of April, 1882, notice of motion was given by *Kahen* for an order for possession.

On the 28th of April *Kahen* applied for and obtained an order in the Queen's Bench Division for re-registration of the bill of sale on the ground that the copy which was registered on the 8th of April was accidentally inaccurate in two or three trivial particulars, and also omitted the words "the third day of each

month." The order for re-registration was made "without prejudice to the rights and interests of parties acquired prior to the time when such bill of sale shall be actually registered."

On the 6th of May the trustee gave notice of motion to set aside the bill of sale on the grounds: 1, that it was fraudulent and void; 2, that, notwithstanding the bill of sale, the goods comprised therein formed part of the bankrupt's property divisible among his creditors under the *Bankruptcy Act*, 1869, s. 15; 3, that the requirements of the *Bills of Sale Act*, 1878, had not been satisfied.

On the 15th of June, 1882, the Judge of the *Exeter* County Court decided in favour of the trustee in bankruptcy, holding upon the authority of *Stansfield* v. *Cubitt* (1), *Badger* v. *Shaw* (2), and *Ex parte Harding* (3), that sect. 15 of the *Bankruptcy Act*, 1869, was unaffected by the *Bills of Sale Act*, 1878, s. 8 (identical with the *Bills of Sale Act*, 1854, s. 1, on which those cases were decided), and that the goods and chattels comprised in the bill of sale were at the commencement of the bankruptcy in the order and disposition of the bankrupt, he being at the time the reputed owner of them, and therefore that they were divisible among his creditors within the intent and meaning of the *Bankruptcy Act*, 1869, s. 15, sub-s. 5, and belonged to and were vested in the trustee. The order was made "notwithstanding the bill of sale and irrespective of its validity or invalidity on the other points raised in the motion of the trustee."

From this order the bill of sale holder now appealed.

Winslow, Q.C., and *F. C. Willis*, in support of the appeal:—

Possession of the goods and chattels comprised in the bill of sale having been taken by the receiver in bankruptcy before the expiration of seven days from the making of the bill of sale, the title of the grantee, who has by the *Bills of Sale Act*, 1878, s. 8, a period of seven days (under the Act of 1854, twenty-one days) within which to complete his title by registration, is valid as against the trustee in bankruptcy: *Brignall* v. *Cohen* (4); *Marples* v.

(1) 27 L. J. (Ch.) 266.
(2) 29 L. J. (Q.B.) 73.
(3) Law Rep. 15 Eq. 223.
(4) 21 W. R. 25.

317

C. J. B. 1882 *In re* HEWER. *Ex parte* KAHEN.

Hartley (1); *Banbury* v. *White* (2); and the goods, when seized by the receiver, were not in the order and disposition of *Hewer* within the *Bankruptcy Act*, 1869, s. 15, sub-s. 5: *Joy* v. *Campbell* (3). We also contend that the registration on the 7th of April was not invalidated by the omission, in the copy filed, of certain unimportant words and trifling clerical mistakes, as errors in the copy filed which are purely clerical and not substantial, by which no one could be misled, may be amended and do not avoid the registration as not being the registration of a "true copy" within the *Bills of Sale Act*, 1878, s. 10, sub-s. 2: *Elliott* v. *Freeman* (4); *Hollingsworth* v. *White* (5); *Gardnor* v. *Shaw* (6); *Lamb* v. *Bruce* (7).

Creed, for the trustee in bankruptcy:—

I. We claim the goods as having been in the order and disposition of the bankrupt when possession was taken by the receiver after the commencement of the bankruptcy, and before registration of the bill of sale. The *Bills of Sale Act*, 1878, s. 20, in providing that chattels comprised in a bill of sale "which has been and continues to be duly registered," shall not be deemed to be in the possession, order, or disposition of the grantor within the meaning of the *Bankruptcy Act*, 1869, s. 15, sub-s. 5, makes registration the express condition on which the goods are taken out of the possession of the bankrupt; a condition which had not been complied with when the receiver took possession.

II. The registration on the 8th of April, 1882, was invalid, as 1, a "true copy" of the bill of sale executed by the grantor was not then registered as required by the *Bills of Sale Act*, 1878, s. 10, sub-s. 2, the copy as registered omitting material words (*i.e.* the day in each month on which payment of the instalments was to be made); and, 2, the description of the residence of *Hewer* given in the affidavit of the attesting solicitor filed with the bill of sale was incorrect at the time of swearing the affidavit, as *Hewer* was not then residing at 53, *Paul Street*, *Exeter*, but had taken his

(1) 30 L. J. (Q.B.) 92.
(2) 2 H. & C. 300.
(3) 1 Sch. & Lef. 328.
(4) 7 L. T. (N.S.) 715.
(5) 10 W. R. 619.
(6) 24 L. T. (N.S.) 319; 19 W. R. 753.
(7) 24 W. R. 645.

passage and left for *America;* and the description must be of his residence at the time of swearing the affidavit, and not of executing the bill of sale: *Button* v. *O'Neill* (1); *Ex parte Wolfe* (2).

BACON, C.J.—

All these cases of bills of sale no doubt have a certain importance, because of their frequent occurrence, and from the circumstances that attend their execution. The law upon the subject is very plain. The mischief that might arise from giving bills of sale, the existence of which was suppressed from the creditors, is so great that on two occasions the Legislature interfered, the object of their interference being that creditors may know who have given bills of sale. Under the first Act of 1854 registration was required to be made within twenty-one days, but that was found not to be sufficient for the purposes of the Legislature, and the time was therefore limited by the second Act of 1878 to seven days. What is the meaning of it? It being notorious that while goods remain in the order and disposition of the debtor, if he becomes bankrupt they may be taken away from the true owner by the creditors, the Act of 1878, which gives seven days within which registration is to be made, enacts in words not to be mistaken that during the seven days given for registration the law of order and disposition shall not apply to the chattels comprised in the bill of sale. Nothing is more distinct and plain than that. Another objection is that the bill of sale has not been duly registered, and that inasmuch as the statute requires that a "true copy" should be registered, that requirement has not been complied with, because on this occasion the copy filed is not a true copy. In what respect is it an untrue copy? A true copy does not necessarily mean an exact copy. It did not in *Gardnor* v. *Shaw* (3), where *Gardnor's* name was spelt with an "e" instead of an "o." The Act does not require it to be an absolutely exact copy, but that it shall be so true that nobody reading it can by any possibility misunderstand it. Now the omission in this case consists of these words each such payment to be made "on the third day of each month." But these are not the only words which

(1) 4 C. P. D. 354. (2) 44 L. T. (N.S.) 321.
(3) 24 L. T. (N.S.) 319.

C. J. B. 1882 *In re* HEWER. *Ex parte* KAHEN.

are introduced into the sentence; the whole sentence runs thus: "Provided in case the mortgagor shall pay to the mortgagee the sum of £150 by twelve consecutive monthly instalments of £10 each; and the first instalment to become due on the 3rd of May and the last on the thirteenth month," and that last-mentioned date is omitted. Is it possible that any one could be misled? The learned Judges in some of the cases cited put it upon the ground that the creditors could not be misled, which is the only one which I should adopt, but in *Elliott* v. *Freeman* (1) Lord Chief Justice *Erle* put it upon much broader grounds, saying that the error (£1000 for £100) fell within a class of clerical errors which since the time of the early *Edwards* the Courts had been in the practice of amending. This is as purely a clerical error as can be imagined. The transcribing clerk has omitted to put in words which have no real bearing on the stipulation: they are at the most a parenthesis, at the most explanatory, and do not alter the stipulation or the proviso in such a manner as can mislead any one, for the stipulation plainly is that payment is to be by monthly instalments, the first being due this particular day, and the last thirteen months after. It is impossible for any one to be misled, and I do not shrink from exercising the authority which I possess, and saying that I will correct what is a clerical error in that instrument. In my opinion it is a sufficiently true copy, and nobody can say that there is anything false in the copy, and it cannot mislead any one who reads it. Then it is said that the residence is not truly described, and I must say that that statement fills me with astonishment. *Button* v. *O'Neill* (2) was referred to, in which the maker of the bill of sale, after he had made it, changed his residence, and the affidavit did not state the changed residence, and the Court at the hearing thought that a fatal defect, and that the Act of Parliament was not complied with. But here there is no such thing. The judgment was delivered by the learned Lord Justice (*Bramwell*), for whom no one can entertain a greater respect than I do, and I do not suppose he would think I am taking any liberty with his name when I say he has always been strict in his application of the law in respect to bills of sale, and on many occasions, some quite recently in the Court of Appeal, he

(1) 7 L. T. (N.S.) 715. (2) 4 C. P. D. 354.

has stated it. But in the case before me I am satisfied that the words of the Act have been complied with, and that any one reading the bill of sale could say where the maker lived, the number of the house, and where he could find him if he wanted to look for him. To say that is not true in the affidavit, or that the man must have known that he did not live there, is not correct. It does not apply to any other residence than the description of the house in which he lived when he executed the bill of sale. In my opinion the Act of Parliament has in every respect been complied with, and the wholesome provision which makes the title of the holder good within seven days, if in that time he registers, cannot be disputed in this bankruptcy. With great respect to the Court below I think there has been an oversight, and that the order was wrong and cannot be sustained.

Order of County Court discharged with costs, and the title of the bill of sale holder (the Appellant) to be declared good.

Solicitors: *Guscotte, Wadham, & Daw*, agents for *Sparkes & Pope, Crediton* and *Exeter; Hamilton.*

F. G. A. W.

END OF VOL. XXI.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January, 1882, will be as follows:—

In the First Series,
19 Ch. D.

In the Second Series,
8 Q. B. D. 7 P. D.

In the Third Series,
7 App. Cas.

INDEX.

ABANDONMENT — Father's right — Religious education - - - - 817
See INFANT. 1.

ABSOLUTE GIFT—Qualified by gift over 811
See WILL. 8.

ACCELERATION OF REMAINDER - 278
See WILL. 4.

ACCOUNTS—After judgment - - 757
See ADMINISTRATION ACTION. 1.

—— Bankruptcy—Duty of bankrupt to furnish
See BANKRUPTCY. 10. [61

ACCUMULATION FUND—Foreign life insurance company - - - - 837
See INSURANCE COMPANY.

ACT OF BANKRUPTCY - - 394, 605
See BANKRUPTCY. 1, 9.

ACTING DRAMA—Copyright—Publication 232
See COPYRIGHT. 1.

ACTIO PERSONALIS MORITUR CUM PERSONÂ
See PRACTICE. 8. [484

ACTION—*In personam*—Two actions on same subject—Stay of proceedings - - 202
See PRACTICE. 20.

—— *In personam*—Dying with the person 484
See PRACTICE. 8.

ADMINISTRATION ACTION — *Executor—Wilful Default — Adding Accounts and Inquiries after Judgment—Rules of Court*, 1875, *Order XXXIII.*] When the statement of claim in an administration action against an executor alleges that he has committed wilful default, but the judgment at the trial gives no relief on that footing (the claim to such relief not being, however, dismissed), the Court can at any subsequent stage of the proceedings, if evidence of wilful default is adduced, direct further accounts and inquiries to be taken and made on that footing.—*Job* v. *Job* (6 Ch. D. 562) as explained by *Mayer* v. *Murray* (8 Ch. D. 424) followed. *In re* SYMONS. LUKE *v.* TONKIN - - - - - 757

ADMINISTRATION ACTION—*continued.*

2. —— *Executor—Defaulting Trustee, Bankruptcy of—Costs of Trustee subsequent to Bankruptcy—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 49.] In an administration action one Defendant was an executor. He was a defaulting trustee under a settlement. After the action was commenced he was adjudicated bankrupt, and a trustee in bankruptcy was appointed and made a Defendant:—*Held*, that the defaulting trustee was entitled to be paid his costs incurred after his bankruptcy.—*Bowyer* v. *Griffin* (Law Rep. 9 Eq. 340) followed. CLARE *v.* CLARE - - 865

3. —— *Legacy for Life—Residuary Legatee—Administration by the Court*] The rule that if personal property consisting of money or stock is limited to *A.* for life, and after his death to *B.* absolutely, it will be ordered into Court for administration in an action by *B.* for the purpose, is not absolute, and will only be enforced as against *A.* where there is reasonable ground, such as danger to the fund, for the application. *In re* BRAITHWAITE. BRAITHWAITE *v.* WALLIS - 121

4. —— *Judgment — Registration—Priority—Protection of Executor—Order of Administration —4 & 5 Wm. & M. c.* 20, *s.* 3—23 & 24 *Vict. c.* 38, *s.* 3.] The meaning of sect. 3 of the Act 23 & 24 Vict. c. 38, like that of sect. 3 of the Act 4 & 5 Wm. & M. c. 20, is, not merely that protection is given to an executor or administrator against an action for a *devastavit* by a judgment creditor of the testator or intestate whose judgment has not been registered, but that such a judgment debt is not entitled in the administration of the estate to any priority over the simple contract debts of the testator or intestate.—*In re Turner* (12 W. R. 337) followed. VAN GHELUVE *v.* NERINCKX - 189

5. —— *Practice—Trustee—Breach of Trust—Bankruptcy — Costs.*] Where the trustee of a settlement became bankrupt shortly after the commencement of an action for the execution of the trusts, and an order was made for payment by him into Court of a sum of money certified to be

ADMINISTRATION ACTION—*continued.*

due from him to the estate, he was held entitled to his costs of the action, though he was not to receive them until he had made good his default.—*Bowyer* v. *Griffin* (Law Rep. 9 Eq. 340). Lewis *v.* Trask - - - - - - 862

6. —— *Revocation of Probate.*] A decree was made at the suit of residuary legatees for the administration of the real and personal estate of a testator. After this a subsequent will was discovered by which the estate was disposed of in a different way. Probate of the old will was recalled, and letters of administration with the later will annexed were granted to one of the beneficiaries.—Under these circumstances the Court of Appeal made an order dismissing the action. *In re* Dean. Dean *v.* Wright - - C. A. 581

ADMISSIONS—Motion for judgment - 716
See Practice. 1.

AFFIDAVIT—Costs—Prolixity - - 835
See Practice. 13.

—— Cross-examination - - - 642
See Practice. 14.

AGENT—Candidate for Parliament—Payment of expenses - - - - 408
See Parliament.

AGREEMENT—Application of funds of trade union—Injunction - - - 194
See Trade Union.

—— For lease—Custom of country - 18
See Landlord and Tenant. 2.

—— For lease—Distress - - - 9
See Landlord and Tenant. 1.

AGRICULTURAL CUSTOM - - - 18
See Landlord and Tenant. 2.

ALIENATION—Forfeiture by - - 278
See Will. 4.

ALLOWANCE—Lunacy - - 297, 615
See Lunatic. 1, 2.

ANTICIPATION—Patent - - - 720
See Patent.

APPEAL—Form of conveyance settled by Judge
See Vendor and Purchaser. 2. [466

—— Liquidator—Leave to appeal - - 381
See Company. 10.

—— Order in Chambers - - - 131
See Practice. 3.

—— Time for - - - - - 1
See Practice. 2.

APPOINTMENT - - - - 332
See Power.

ATTACHMENT—Discharge of prisoner - 230
See Practice. 4.

—— Motion for - - - - 360
See Practice. 5.

ATTESTATION—Bill of sale - - 543
See Bill of Sale. 1.

ATTORNEY-GENERAL—Duchy of *Lancaster*—Right to attend proceedings in Lunacy
See Lunatic. 3. [613

—— Public injury—Illegal act - - 752
See Practice. 16.

ATTORNMENT CLAUSE—Mortgage - 442
See Bankruptcy. 3.

AUCTIONEER—Witness—Expenses - 831
See Practice. 15.

AUSTRALIAN BANKRUPTCY - - 674
See Partition Suit.

AUSTRALIAN PROBATE - - - 674
See Partition Suit.

BANK OF ENGLAND—Duty to register stock in name of Local Board - - 176
See Local Government Acts. 1.

BANKRUPT CONTRIBUTORY - - 849
See Company. 9.

BANKRUPTCY—*Act of Bankruptcy—Debtor's Summons—"Trader"—Discontinuance of Trade with Intention of resuming it—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 8.] If a debtor, who has been a trader, is not actually carrying on trade at the time when it is alleged by a petitioning creditor that he has done or omitted to do that, the doing or omission of which would be an act of bankruptcy only if it was done or omitted by a trader, it is a question of intention, to be decided on the evidence, whether the debtor has permanently ceased to trade, or has only temporarily discontinued his trade with the intention of resuming it. In the latter case he is still a trader within the meaning of the *Bankruptcy Act.*—The law on this point is still as it was laid down in *Ex parte Paterson* (1 Rose, 402) and *Ex parte Cundy* (2 Rose, 357).—*Per Jessel*, M.R.: If a petitioning creditor alleges that the debtor has committed an act of bankruptcy which can be committed only by a trader, the *onus* is on him to prove that the debtor was, within the meaning of the *Bankruptcy Act*, a trader at the time when the act was committed. *Ex parte* Salaman. *In re* Taylor [C. A. 394

2. —— *Books of Account of the Bankrupt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 22—*Bankruptcy Rules*, 1870, *r.* 110.] A *bonâ fide* purchaser for value of the book-debts, books, and all the interest in the partnership of his partner prior to a dissolution, will not be compelled upon the subsequent bankruptcy of such late partner to hand over to the trustee the books of account which passed by the assignment, and thereupon ceased to be property of the bankrupt within the meaning of the *Bankruptcy Act*, 1869, s. 22, and Bankruptcy Rules, 1870, r. 110. *In re* West. *Ex parte* Good - - - - - 868

3. —— *Distress — Mortgage — Attornment Clause—Validity—Bankruptcy of Mortgagor—Mortgage to Building Society—Advance repayable in Monthly Instalments—Monthly Tenancy—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 1—*Lease not in writing—"Uncertain" Rent.*] A member of a building society borrowed £7500 from the society, which was to be repaid in a series of monthly instalments of £71 17*s.* 6*d.* each, including interest at 7 per cent. The instalments were payable at the monthly meetings of the society, and, if the member neglected to pay them when due, he became liable to a fine, at the rate of 5 per cent. per month on the total amount in arrear and unpaid at each meeting. To secure the loan he executed to the trustees of the society a mortgage of real estate. The deed contained a proviso that if the member should fail for three monthly meetings to

BANKRUPTCY—*continued.*

pay his subscriptions, interest, fines, or other moneys, or to observe the regulations of the society, or in the event of his becoming bankrupt, the mortgagees might enter into possession or receipt of the rents of the mortgaged property. And "for the better securing the payments which by the rules of the society ought to be made by the mortgagor," it was agreed that, if the mortgagees should at any time become entitled to enter into possession or receipt of the rents, and the mortgagor should then or afterwards be in the occupation of the whole or part of the property, he should during such occupation be tenant thereof from month to month to the mortgagees, at a monthly rent equal in amount to the moneys which ought to be paid monthly by the mortgagor from time to time for subscriptions, interest, fines, and other moneys under the rules, and that the tenancy should commence on the day up to which he should have fully paid all and every part of such subscriptions, interest, fines, and other moneys, and the rent for the period intervening between the commencement of the tenancy and the day on which the trustees should be entitled to enter into possession or receipt of rents should be payable and paid on that day, and the monthly rent due upon and subsequently to that day should become due monthly in advance, and be payable at the monthly meetings, the first payment of rent becoming due on that day on which the mortgagees should first become entitled to enter into possession. Power was given to the mortgagees to determine the tenancy by fourteen days' notice. —The deed was not executed by the mortgagees, nor was it registered under the *Bills of Sale Act.* The mortgagor committed default in his payments, and was afterwards adjudicated a bankrupt:—*Held*, that the attornment clause, and distresses levied under it for rent which accrued due both before and after the commencement of the bankruptcy, were valid as against the trustee in the bankruptcy. — Decision of *Bacon*, C.J., affirmed.—*Held*, that it was no objection to the attornment clause that the monthly rent was fluctuating in amount.—A rent the amount of which may fluctuate according to the happening of certain events is not an uncertain rent.—*Held*, also, that the tenancy under the attornment clause was not made by sect. 1 of the *Statute of Frauds* a tenancy at will.—*Ex parte Williams* (7 Ch. D. 138); *In re Stockton Iron Furnace Company* (10 Ch. D. 335); and *Ex parte Jackson* (14 Ch. D. 725), discussed. *Ex parte* VOISEY. *In re* KNIGHT [C. A. 442

4. —— *Jurisdiction—Discretion as to exercise —Fraudulent Deed*—13 *Eliz. c.* 5—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 72.] When the trustee in a bankruptcy which is proceeding in a County Court impeaches a deed executed by the bankrupt as fraudulent under the Statute of *Elizabeth*, if the amount at stake is beyond the ordinary jurisdiction of a County Court and serious questions of character are involved, and the person interested under the deed desires that the question should not be tried in the County Court, the Judge ought to decline to exercise the jurisdiction conferred by sect. 72, and ought to leave the matter to be tried in an action in the High Court in the ordinary way.—*Ex parte Armitage* (17 Ch. D. 13) approved. *Ex parte* PRICE. *In re* ROBERTS [C. A. 553

5. —— *Liquidation Petition — Statement of Debtor's Affairs—Sufficiency—Debtor in Partnership — Solvent Partner — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126.] A debtor who carries on one business alone, and another in partnership, must when he files a liquidation petition (his partner being solvent) set forth in his statement of affairs the assets and liabilities of the partnership business in detail, as well as his own separate assets and liabilities; *i.e.* in each case he must give the names of the creditors, with the amount due to each and the names of the debtors, with the amount due from each. He must also state the account between himself and his partner, so as to shew the balance (if any) due to him.—If he does not give these particulars, his statement of affairs will be insufficient, and any liquidation or composition resolutions founded on it cannot be registered.—If for any reason it is impossible for the debtor to make such a statement of the affairs of the partnership, he cannot have a liquidation of his affairs by arrangement or a composition, but must submit to bankruptcy.—If without setting out the above particulars in his statement of affairs, the debtor refers (in such a way as to incorporate it with his statement) to a report made by an accountant which contains the necessary information, and which is produced to the meetings of creditors.—*Semble*, that this would be a sufficient statement. *Ex parte* AMOR. *In re* AMOR - - - - - C. A. 594

6. —— *Proof in Bankruptcy—Admission by Trustee—Right to apply to expunge—Lapse of Time—Bankruptcy Rules*, 1870, *rr.* 72, 73.] Under rule 73 of the Bankruptcy Rules, 1870, as under the previous practice, a trustee in bankruptcy who has admitted a proof against the estate is entitled at any time afterwards to apply to the Court to expunge the proof, on the ground that it was originally wrongly admitted. Mere lapse of time is no objection to the application, but, though the proof is expunged, the creditor will be entitled to retain any dividend which he may have previously received. *Ex parte* HARPER. *In re* TAIT [C. A. 537

7. —— *Proof—Covenant not to revoke Will—Contingent Liability—Discharge.*] A covenant not to revoke a will is not necessarily against public policy, as being in restraint of marriage.—A mortgagor not a trader appointed certain property by will as a security to the mortgagee, and covenanted not to revoke the will. She became bankrupt under the *Bankruptcy Act*, 1849, and obtained her discharge.—*Held*, that the contingent liability under the covenant not to revoke was incapable of proof under the bankruptcy, and that an action would lie for damages for breach of the covenant committed after her discharge. ROBINSON *v.* OMMANNEY - - - 780

8. —— *"Property" of Bankrupt—Vesting in Trustee—"Salary or Income"—Pension of Retired Civil Servant of Crown—Retired Judge of Crown Colony—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 4, 15, 17, 88, 89, 90.] The effect of

BANKRUPTCY—*continued.*

sects. 15 and 17 of the *Bankruptcy Act*, 1869, is to vest in the trustee in a bankruptcy all the "property" of the bankrupt of whatever nature, including the matters dealt with by sect. 23 and sects. 87 to 95, but subject to the exceptions and qualifications introduced by those sections.—The pension of a retired Judge of a Crown colony, granted by the Secretary of State for the Colonies, and voted annually by the Legislature of the colony, is, in case of the bankruptcy of the Judge, "property" which vests in the trustee in the bankruptcy, but it is "income" of the bankrupt within sect. 90 of the *Bankruptcy Act*, 1869, and is subject to the power thereby given to the Court to determine how much of it shall be set aside for the benefit of the bankrupt's creditors. *Ex parte* Huggins. *In re* Huggins - - C. A. 85

9. —— *Protected Transaction—Notice of Act of Bankruptcy available for Adjudication — Debtor's Summons—Bankruptcy Act*, 1869, *s.* 94, *sub-s.* 3.] After the Plaintiff had commenced an action against the Defendant for dissolution of partnership, the Plaintiff took out a debtor's summons against the Defendant. The Defendant failed to comply with it, and the Plaintiff filed a petition of bankruptcy against him based on the summons.—Another creditor afterwards took out a debtor's summons against the Defendant, and, on his non-compliance with it, filed a petition and obtained adjudication of bankruptcy against him. Before the adjudication and without notice of the act of bankruptcy on which it was based, the Plaintiff entered into an agreement with the Defendant for compromise of the action, which the trustee in the bankruptcy sought to impeach as void against the creditors:—*Held* (reversing the decision of *Chitty*, J.), that although the non-compliance with the Plaintiff's debtor's summons was not an act of bankruptcy available for adjudication on the petition of the particular creditor who obtained the adjudication against the Defendant, it was an act of bankruptcy "available for adjudication" within the meaning of the *Bankruptcy Act*, 1869, s. 94, and therefore the agreement for compromise between the Plaintiff and Defendant was not a protected transaction under that section.—*Ex parte Crosbie* (7 Ch. D. 123) distinguished, and the judgment of *James*, L.J., explained. Hood *v.* Newby - C. A. 605

10. —— *Statement of Bankrupt's Property—Duty of Bankrupt to furnish Accounts—Order to file Cash Account—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 19.] Sect. 19 of the *Bankruptcy Act*, 1869, gives the Court power to order a bankrupt to file a cash account of his receipts and payments for a specified period before his bankruptcy, and, if the circumstances which appear on the file of proceedings shew that such an order ought to be made, the Court can make it without any further evidence.—The Court, however, has a discretion in the matter, and such an order ought not to be made as a matter of course, but only under special circumstances.—*Ex parte Crawford* (28 L. T. (N.S.) 244) approved and followed.—A bankrupt who had been engaged in an extensive business as a promoter of public companies, had kept no accounts, and could produce no record whatever of his transactions, except his banker's pass-book, and some counterfoils of recent cheques: —*Held*, that this was a sufficient reason for ordering him to file a cash account of his receipts and payments for two years before his bankruptcy. *Ex parte* Moir. *In re* Moir - - C. A. 61

11. —— *Trustee in Bankruptcy—Administration of Bankrupt's Property—Directions of Creditors—Application to Court for Directions—Power of Court to direct Trustee to disregard Resolution of Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 14, 20.] Under sect. 20 of the *Bankruptcy Act*, 1869, a trustee in bankruptcy is entitled to apply to the Court for directions in relation to any particular matter arising under the bankruptcy, as to which the creditors have already by resolution at a general meeting, given him directions, and the Court has power for just cause shewn to direct the trustee to disregard the directions of the creditors and to act contrary to them. In such a case the Court ought not to order the resolution to be vacated or to declare it void, but simply to direct the trustee to disregard it.—Even though there be no fraud in the passing of a resolution giving the trustee directions as to the administration of the estate, yet, if the majority of the creditors have voted, not simply with the view of administering the estate in the best way for the benefit of all the creditors, but with the view of favouring the debtor or persons whom he is alleged to have fraudulently preferred, the Court ought to direct the trustee to disregard the resolution.—Sect. 20 is to be construed with reference to sect. 14.—*Ex parte Emmanuel* (17 Ch. D. 35) explained. *Ex parte* Cocks. *In re* Poole [C. A. 397

12. —— *Witness examined under Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 96—*Right to Copy of Depositions—Creditor—Bankruptcy Rules*, 1870, *rr.* 9, 12.] The Court has a discretion whether to give a copy of the shorthand notes of the deposition of a witness examined under sect. 96 of the *Bankruptcy Act*, 1869, but where a creditor had been so examined he was allowed a copy. *Ex parte* Pratt. *In re* Hayman [C. A. 439

13. —— *Witness—Examination as to Bankrupt's Dealings or Property—Jurisdiction to order Account—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96, 97.] Under sects. 96 and 97 of the *Bankruptcy Act*, 1869, the Court of Bankruptcy has no jurisdiction to order a witness to furnish an account in writing (not on oath) of money transactions between himself and the bankrupt, or property of the bankrupt received by him. *Ex parte* Reynolds. *In re* Reynolds - C. A. 601

—— Australian—Real estate in *England* 674
See Partition Suit.

—— Bankrupt Defendant—Costs - - 862
See Administration Action. 5.

—— Bankrupt trustee—Costs - 862, 865
See Administration Action. 2, 5.

—— Condition determining estate on - 838
See Will. 5.

BANKRUPTCY RULES, 1870, rr. 9, 12 - 439
See Bankruptcy. 11.

BANKRUPTCY RULES, 1870—*continued.*
—— rr. 72, 73 - - - - 537
See BANKRUPTCY. 6.
—— r. 110 - - - - - 868
See BANKRUPTCY. 2.

BILL OF SALE — *Registration — Statement of Consideration—Affidavit of "Attestation"—Explanation by Attesting Solicitor—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.] A mortgage of a leasehold brewery and some chattels was stated to be made in consideration of £2000 paid by the grantee to the grantor "immediately before the execution of these presents." No money was in fact paid by the grantee to the grantor, but the £2000 was the balance due by the grantor to the grantee in respect of the purchase-money of the brewery, which had been assigned by the grantee to the grantor, in consideration of £2500, by a deed executed immediately before the mortgage. Of this sum only £500 was paid by the grantor, it being agreed that the balance of £2000 should be secured by the mortgage:—*Held*, that the consideration was truly stated in the mortgage deed, so as to satisfy sect. 8 of the *Bills of Sale Act*, 1878. —It is not necessary that the affidavit filed on the registration of a bill of sale should state that the solicitor who attested the execution of the deed explained the effect of it to the grantor before he executed it.—Decision of *Bacon*, C.J., affirmed. *Ex parte* BOLLAND. *In re* ROPER - **C. A. 543**

2. —— *Registration—Statement of Consideration—Defeasance or Condition—Agreement not to register—Payment of increased Bonus—Misdescription of Grantor—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.] A bill of sale was expressed to be made in consideration of £242 advanced by the grantee to the grantors, and the grantors agreed to repay the advance, together with a sum of £100 by way of interest and bonus, in certain instalments. There was a verbal agreement by the grantee not to register the bill of sale, in consequence of which he charged a larger bonus for the advance than he would otherwise have done.—*Held*, that the agreement not to register was a mere collateral agreement, and not part of the consideration for the bill of sale, and that, therefore, it was unnecessary to state it in the deed.—*Held*, also, that the agreement was not a "defeasance or condition" to which the deed was subject within the meaning of sect. 10 of the *Bills of Sale Act*, 1878.—A bill of sale and the affidavit filed on its registration described the grantors (who were father and son) by their true addresses, and added that they were mantle manufacturers carrying on business together under a specified firm. They had in fact formerly carried on the business of mantle manufacturers in partnership, but, at the time when the bill of sale was executed, the partnership had been dissolved, and the business was being carried on by the father alone, the son being in his employment as a clerk. The property comprised in the deed in fact belonged to the father alone, though both father and son joined in the assignment. The father alone filed a liquidation petition.—*Held*, that there was no misdescription of the grantors such as to affect the validity of the registration; (1) because the son not being a bankrupt, any misdescription of him was immaterial; (2) because as to the father, the statement that he was carrying on business with his son was mere surplusage, and was not misleading. *Ex parte* POPPLEWELL. *In re* STOREY - - **C. A. 73**

3. —— *Registration—"True Copy"—Clerical Error—Description of Residence of Maker—Order and Disposition—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10 (*sub-s.* 2), 20—*Bankruptcy Act*, 1869, *s.* 15. *sub-s.* 5.] I. During the period of seven days between the making and registration of a bill of sale, the order and disposition clause (*Bankruptcy Act*, 1869), s. 15, sub-s. 5, does not apply to the goods and chattels comprised in the bill of sale, so that as against the trustee in bankruptcy, who by the receiver has before the expiration of the seven days taken possession of such goods, the bill of sale holder is entitled.—II. A "true copy" of a bill of sale within the *Bills of Sale Act*, 1878, s. 10, sub-s. 2, must not necessarily be an exact copy, so long as any errors or omissions in the copy filed are merely clerical and of such a nature that no one could be thereby misled. —III. The description of the residence of the maker of a bill of sale required by the *Bills of Sale Act*, 1878, s. 10, sub-s. 2, to be stated in the affidavit filed therewith, is not rendered incorrect so as to avoid the bill of sale, by the fact that between the execution of the bill of sale and the date of the affidavit the maker had left his residence, as described in the affidavit, for *America*. —*Button* v. *O'Neill* (4 C. P. D. 354) distinguished. *In re* HEWER *Ex parte* KAHEN - - **871**
—— Unregistered—Execution - - **510**
See COMPANY. 11.

BOARD OF TRADE RULES, 28th August, 1872, r. 6 - - - - - **837**
See INSURANCE COMPANY.

BOOK—Copyright - - - - **369**
See COPYRIGHT. 2.

BORROWING POWERS—Railway company **309**
See RAILWAY COMPANY.

BREACH OF TRUST — Company — Directors—Shareholders - - - **149**
See COMPANY. 1.
—— Costs of trustee—Bankruptcy - **862, 865**
See ADMINISTRATION ACTION. 2, 5.

CANCELLATION—Registration of trade-mark
See TRADE-MARK. 1. [47

CANVASSERS—Election for Parliament — Expenses - - - - - **408**
See PARLIAMENT.

CAPITAL—Payment of dividends out of **149, 519**
See COMPANY. 2, 3.

CASES—*Adams' Settled Estates, In re* (9 Ch. D. 116), not followed - - - **123**
See SETTLED ESTATES ACT. 2.
—— *Andrews* v. *Salt* (Law Rep. 8 Ch. 622) considered - - - - **817**
See INFANT. 1.
—— *Armitage, Ex parte* (17 Ch. D. 13) approved
See BANKRUPTCY. 4. [553
—— *Astley* v. *Weldon* (2 B. & P. 346) commented on - - - - **243**
See PENALTY.

CASES—*continued.*

—— *Atkyns* v. *Kinnier* (4 Ex. 776) commented on - - - - - 243
See Penalty.

—— *Attorney-General* v. *Cockermouth Local Board* (Law Rep. 18 Eq. 172) considered 752
See Practice. 16.

—— *Attorney-General* v. *Ely, Haddenham, and Sutton Railway Company* (Law Rep. 4 Ch. 194) considered - - 752
See Practice. 16.

—— *Attorney-General* v. *Great Eastern Railway Company* (11 Ch. D. 449) considered 752
See Practice. 16.

—— *Attorney-General* v. *Sidney-Sussex College* (15 W. R. 162) observed upon - 513
See Charity. 1.

—— *Betts* v. *Burch* (4 H. & N. 506) commented on - - - - - 243
See Penalty.

—— *Bowyer* v. *Griffin* (Law Rep. 9 Eq. 340) followed - - - 862, 865
See Practice. 18.
Administration Action. 2, 5.

—— *Brandon* v. *Brandon* (7 D. M. & G. 365) considered and distinguished - 1
See Practice. 2.

—— *Button* v. *O'Neill* (4 C. P. D. 354) distinguished - - - - 871
See Bill of Sale. 3.

—— *Catterina Chiazzare, The* (1 P. D. 368) considered and distinguished - 202
See Practice. 20.

—— *Clarke* v. *Law* (2 K. & J. 28) approved 642
See Practice. 14.

—— *Cobbett* v. *Woodward* (Law Rep. 14 Eq. 407) overruled - - - - 369
See Copyright. 2.

—— *Coventry and Dixon's Case* (14 Ch. D. 660) commented on - - - 492, 519
See Company. 3, 4.

—— *Cox* v. *Mitchell* (7 C. B. (N. S.) 55; 29 L. J. (C.P.) 33) followed - - - 202
See Practice. 20.

—— *Crawford, Ex parte* (28 L. T. (N.S.) 244), approved and followed - - 61
See Bankruptcy. 10.

—— *Creaton* v. *Creaton* (3 Sm. & Giff. 386) followed - - - - 790
See Will. 2.

—— *Crosbie, Ex parte* (7 Ch. D. 123), distinguished - - - - 605
See Bankruptcy. 9.

—— *Croughton's Trusts* (8 Ch. D. 460) distinguished - - - - 748
See Will. 2.

—— *Cundy, Ex parte* (2 Rose, 357), followed 394
See Bankruptcy. 1.

—— *Delta, The* (1 P. D. 393) considered and distinguished - - - - 202
See Practice. 20.

—— *Ellis' Trusts* (Law Rep. 17 Eq. 409) followed - - - - 748
See Will. 12.

CASES—*continued.*

—— *Emmanuel, Ex parte* (17 Ch. D. 35), explained - - - - 397
See Bankruptcy. 11.

—— *Festing* v. *Allen* (12 M. & W. 279) distinguished - - - - 790
See Will. 2.

—— *Gisborne* v. *Gisborne* (2 App. Cas. 300) distinguished - - - - 615
See Lunatic. 2.

—— *Hawksworth* v. *Hawksworth* (Law Rep. 6 Ch. 539) considered - - - 817
See Infant. 1.

—— *Hill* v. *Hill* (10 W. R. 400) considered 817
See Infant. 1.

—— *Hinchinbroke (Lord)* v. *Seymour* (1 Bro. C. C. 395) considered and examined - 332
See Power.

—— *Holloway* v. *Cheston* (19 Ch. D. 516) not followed - - - - 131
See Practice. 3.

—— *Jackson, Ex parte* (14 Ch. D. 725) discussed
See Bankruptcy. 3. [442

—— *Jackson* v. *Dover* (2 H. & M. 209) followed
See Will. 7. [806

—— *Job* v. *Job* (6 Ch. D. 562) followed - 757
See Administration Action. 1.

—— *Kemble* v. *Farren* (6 Bing. 141) commented on - - - - - 243
See Penalty.

—— *Kennedy* v. *Green* (3 My. & K. 699) distinguished - - - - 685
See Vendor and Purchaser. 3.

—— *Lovat (Lord)* v. *Duchess of Leeds* (2 Dr. & Sm. 62) followed - - - 105
See Will. 6.

—— *Magee* v. *Lavell* (Law Rep. 9 C. P. 107) commented on - - - 243
See Penalty.

—— *Mali Ivo, The* (Law Rep. 2 A. & E. 356) considered and distinguished - 202
See Practice. 20.

—— *Mammoth Copperopolis of Utah, In re* (50 L. J. (Ch.) 11) distinguished - 149
See Company. 2.

—— *Mayer* v. *Murray* (8 Ch. D. 424) followed
See Administration Action. 1. [757

—— *National Funds Assurance Company, In re* (10 Ch. D. 118), considered - 519
See Company. 3.

—— *Newman, In re* (4 Ch. D. 724), commented on - - - - - 243
See Penalty.

—— *Paterson, Ex parte* (1 Rose, 402), followed
See Bankruptcy. 1. [394

—— *Perry-Herrick* v. *Attwood* (25 Beav. 205; 2 De G. & J. 21) explained and followed
See Mortgage. 3. [124

—— *Reuss, Princess of* v. *Bos* (Law Rep. 5 H. L. 176) discussed and distinguished 209
See Company. 7.

—— *Richards* v. *James* (Law Rep. 2 Q. B. 285) doubted - - - - 510
See Company. 11.

CASES—*continued.*

—— *Robertson* v. *Norris* (1 Giff. 421) disapproved of - - - - **857**
See Mortgage. 4.

—— *St. Thomas' Dock Company In re* (2 Ch. D. 116), followed - - - **769**
See Company. 12.

—— *Sandon* v. *Hooper* (6 Beav. 246; 14 L. J. (Ch.) 120) commented on - **469**
See Mortgage. 1.

—— *Stockton Iron Furnace Company, In re* (10 Ch. D. 335) discussed - - **442**
See Bankruptcy. 3.

—— *Stringer's Case* (Law Rep. 4 Ch. 475) distinguished - - - - **149**
See Company. 2.

—— *Turner, In re* (12 W. R. 337) followed **189**
See Administration Action. 4.

—— *Walmsley* v. *Foxhall* (1 D. J. & S. 451) considered and distinguished - - **1**
See Practice. 2.

—— *Williams, Ex parte* (7 Ch. D. 138), discussed
See Bankruptcy. 3. [**442**

CASH ACCOUNT—Bankruptcy—Order to file **61**
See Bankruptcy. 10.

CATALOGUE—Illustrated—Copyright - **369**
See Copyright. 2.

CERTIFICATE—Breaches of patent - **720**
See Patent.

CHAMBERS—Practice in—Appeal from order
See Practice. 3. [**131**

CHANCERY FUNDS RULES, 1874, rr. 14, 91
See Practice. 6. [**776**

CHARITY — *Registered Building — Leave of Charity Commissioners*—16 & 17 *Vict. c.* 137, *ss.* 17, 62—18 & 19 *Vict. c.* 81, *s.* 9.] An action for removing the minister of a building registered as a place of meeting for religious worship and for administering the trusts of the deed relating to such building can be prosecuted without the certificate of the Charity Commissioners. — *Attorney-General* v. *Sidney-Sussex College* (21 Ch. D. 514, n.) observed upon. Glen *v.* Gregg **C. A. 513**

2. —— *College—Leave of Charity Commissioners*—16 & 17 *Vict. c.* 137, *ss.* 17, 62 [*Revised Ed. Statutes, vol. xi. pp* 986, 999.] An information cannot be brought against a college in one of the Universities without the leave of the Charity Commissioners. Attorney-General *v.* Sidney-Sussex College, Cambridge - **C. A. 514, n.**

CHARITY COMMISSIONERS—Leave of - **513,**
See Charity. 1, 2. [**514, n.**

CHILDREN—Class - - - - **806**
See Will. 7.

CLASS—Vesting - - - - **806**
See Will. 7.

CLERICAL ERROR - - - - **871**
See Bill of Sale. 3.

COMMENCING BUSINESS—Company - **209**
See Company. 7.

COMPANY—*Director—Casual Vacancy—General Meeting.*] The articles of association of a company provided that the directors might fill up any casual vacancy on the board.—A casual vacancy occurred, and before it was filled up by the board

COMPANY—*continued.*

a general meeting of the company was held.—The vacancy was not filled up by the general meeting:—*Held*, that the power of the board to fill up the vacancy remained.—*Semble*, the general meeting could have filled up the vacancy. Munster *v.* Cammell Company - - **183**

2. —— *Director — Misfeasance — Payment of Dividend out of Capital — Money borrowed to pay Dividend — Measure of Damages — Shareholders and Creditors Parties to Breach of Trust —Indemnity—Delay—Stale Demand—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165 [*Revised Ed. Statutes, vol. xiv. p.* 238.] The articles of association of a company provided that all dividends on shares should be made only out of the clear profits of the company, and that all moneys borrowed by the company and all moneys received under insurances of the company's property against destruction or damage by fire should be deemed capital.—A building of the company having been destroyed by fire, the company resolved to increase the capital by £150,000 for the purpose of reconstructing the building, and to issue for this purpose 15,000 preference shares. These shares were issued, and during the reconstruction of the building, no profits having been earned by the company, the directors paid four dividends on the shares. The first dividend was paid out of moneys received from an insurance company in respect of the loss occasioned by the fire. The other three dividends were paid by means of moneys borrowed expressly for the purpose from the contractors of the company and a financial company, both of whom had notice of the purpose for which the money was borrowed, and both of whom held a large number of the preference shares:—*Held*, that the directors were, under sect. 165 of the *Companies Act*, 1862, jointly and severally liable to pay to the liquidator the amount of the first dividend.—But with respect to the other three dividends, *held*, that the result of the transactions, as a whole, had been only to increase the amount of the proofs against the company by the amount of the loans, and that consequently the directors were jointly and severally liable to pay to the liquidator only such a sum as would enable him to pay on all the debts of the company a dividend equal to that which would have been paid on all the debts (other than the loans), in case no proof had been made in respect of the loans.—But, *held*, that the order must be made without prejudice to the right of the directors to be indemnified by any shareholders or creditors of the company who were parties or privies to the payment of the dividends out of capital, and that three months from the date of the Chief Clerk's certificate of the amount payable by the directors must be given to them to make the payment.—The dividends in question were paid in January and July, 1874, and in January and July, 1875. The order to wind up the company was made in November, 1876. A liquidator was appointed in December, 1876; he afterwards retired, and his successor was appointed in December, 1878. The summons against the directors was issued in February, 1880:—*Held*, that there had been no such delay as to disentitle the liquidator to make

the application.—*Stringer's Case* (Law Rep. 4 Ch. 475) and *In re Mammoth Copperopolis of Utah* (50 L. J. (Ch.) 11) distinguished. *In re* Alexandra Palace Company - - - 149

3. —— *Directors—Payment of Dividends out of Capital—Set-off—Statute of Limitations.*] The directors of a limited company for several years presented to the general meetings of shareholders reports and balance-sheets in which various debts known by the directors to be bad were entered as assets, so that an apparent profit was shewn though in fact there was none. The shareholders, relying on these documents, passed resolutions declaring dividends, which the directors accordingly paid. An order having been made to wind up the company the liquidator applied, under sect. 165 of the *Companies Act*, 1862, for an order on the directors to replace the amount of dividends thus paid out of capital:—*Held*, by *Bacon*, V.C., and by the Court of Appeal, that as regards each half-yearly dividend the persons who were directors when it was paid were liable for the whole amount paid for the dividends of that half-year, and that *In re National Funds Assurance Company* (10 Ch. D. 118) is in no way affected by *Coventry and Dixon's Case* (14 Ch. D. 600). The order of *Bacon*, V.C., declared them to be jointly liable, but this was varied on appeal by declaring them jointly and severally liable:—*Held*, that even if the shareholders had known the true facts, so that their ratification of the payment of dividends would have bound themselves individually, they could not bind the company, for that the payment of dividends out of *corpus* was *ultrà vires* the company, and incapable of ratification by the shareholders:—*Held*, further, that the fact that the capital thus improperly applied was distributed *pro ratâ* among the whole body of shareholders did not protect the directors, for that the shareholders were not the corporation, and that payment to them would not prevent the corporation before winding-up, or the liquidator after winding-up, from compelling the directors to replace the money that it might be applied to proper purposes:—*Held*, further, that the directors could not set off any money due from the company to them against the amounts which they were ordered to replace: *Held*, also, that the claim was for a breach of trust, and that the *Statute of Limitations* could not be set up. *In re* Exchange Banking Company. Flitcroft's Case C. A. 519

4. —— *Director—Misappropriation of Funds by Directors—Repayment by Directors—Investment of Money misappropriated in Debentures of the Company—Set-off by Director—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 101, 165.] The directors of a company passed a resolution to pay £3000 to *P.*, who was one of the promoters, for services rendered, upon an understanding, which was not reduced into writing, that he should expend £400 in advertisements and advance the residue to the company on the security of debentures. The directors accordingly paid *P.* the money, and he spent £400 as arranged, and advanced the remaining £2600 to the company on debentures, which he divided between himself and certain of the directors. The company was afterwards wound up:—*Held* (affirming the decision of *Hall*, V.C.), that the directors were jointly and severally liable to repay the £2600 to the company; that the advance of the money to the company on debentures was not a repayment to the company; and that it made no difference whether the arrangement to invest the money in debentures under which it was originally paid to *P.* was binding or not.—At the time of the winding-up the company was indebted to one of the directors who were thus held liable, for money advanced for expenses:—*Held*, that he could not set off the debt against his liability for the misappropriation of the company's money.—*Coventry and Dixon's Case* (14 Ch. D. 660) commented on. *In re* Anglo-French Co-operative Society. *Ex parte* Pelly [C. A. 492

5. —— *Shareholder — Charge — Contribution—Locke King's Act* (17 & 18 *Vict. c.* 113).] A testator held shares in a banking company by whose deed of settlement it was provided that if any shareholder did not on demand pay all moneys due from him to the company, the directors might declare his shares forfeited, and that nevertheless he should still be liable to pay the debt, and it was also provided that a shareholder must have paid all moneys due from him to the company before he could transfer his shares. The testator borrowed money from the company, and deposited the deeds of certain real estate with them as security. By his will he gave the above estate to his son *A.*, and his residuary property to his other sons. *A.* claimed that the testator's shares in the bank should contribute rateably to payment of the debt:—*Held*, by *Chitty*, J., and by the Court of Appeal, that the provisions of the deed of settlement did not create a charge or lien on the shares for a debt due from the holder, and that no case for contribution arose:—*Held*, also that if the deed of settlement had charged the shares with all debts due from the shareholder to the company, a debt for which real estate had been specifically mortgaged would still have been payable out of the mortgaged estate before resorting to the shares which were only subject to a general lien. *In re* Dunlop. Dunlop *v.* Dunlop [C. A. 583

6. —— *Shareholder—Trustee of Shares—Lien on Shares for Debt of Trustee—Equitable Title to Shares—Priority.*] The trustees of a marriage settlement which authorized them to invest in the shares of any trading company, invested part of their trust funds in the purchase of shares in a limited banking company, which were transferred into their joint names. By the articles it was provided that the company should have a first and paramount charge on the shares of any shareholder for all moneys owing to the company from him alone or jointly with any other person, and that when a share was held by more persons than one the company should have a like lien and charge thereon in respect of all moneys so owing to them from all or any of the holders thereof alone or jointly with any other person. One of the trustees was a partner in a firm which afterwards went into liquidation, at which time it owed the company a debt which had arisen long after the registration of the shares in the names of the trustees:—*Held*, by *Bacon*, V.C.,

COMPANY—*continued.*

and by the Court of Appeal, that the bank had a lien on the shares for this debt which must prevail over the title of the *cestuis que trust.*—Whether as between themselves and the *cestuis que trust* the trustees were authorized to make such an investment, *quære.* New London and Brazilian Bank *v.* Brocklebank - **C. A. 302**

7. —— *Winding-up—Business of the Company at Home and Abroad — Commencing Business — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 2.] When a company is incorporated to carry on business in the *United Kingdom* and in other parts of the world, and it has commenced to carry on its business in a foreign country, and there appears a *bonâ fide* intention to commence business in this country, the mere fact that it has not actually commenced in this country the objects for which it was incorporated within a year from its incorporation is not a sufficient ground for ordering the company to be wound up under the *Companies Act*, 1862, s. 79, sub-s. 2.—*Princess of Reuss* v. *Bos* (Law Rep. 5 H. L. 176) discussed and distinguished. *In re* Capital Fire Insurance Association - - - - **C. A. 209**

8. —— *Winding-up—Claim of Landlord for Rent subsequent to Commencement of Winding-up*]. *E.* demised a colliery to a limited company for twenty-five years from January, 1858. The company mortgaged it by under-lease. In 1878 an agreement was come to between *E.* and the company for a new lease of the colliery and of the mines under 163 acres of adjoining land, these latter mines to be worked by outstroke. The company then brought plant and machinery on the 163 acres, sunk trial pits, and found coal, but no new lease was granted. On the 28th of January, 1880, the mortgagees took possession of the colliery, but did not interfere with the 163 acres. On the 31st of January, 1880, a petition was presented to wind up the company, on which an order was made. The liquidator did not take possession either of the colliery or of the 163 acres, or the minerals under them, nor did he take any steps to give the demised property up to *E.* The plant and machinery brought on the 163 acres remained there. In May, 1880, the liquidator had the whole plant and machinery, both on the colliery and on the 163 acres, valued, with a view to a sale of these chattels to the mortgagees, that they might sell the property as a going concern, but this purchase by the mortgagees were not carried into effect. In May, 1881, the liquidator advertised the whole plant and machinery for sale. On the 30th of May, 1881, *E.* took out a summons for leave to distrain on the plant and machinery on the 163 acres, or to have the proceeds paid to him. In June, 1881, the plant and machinery were sold. In January, 1882, *Kay*, J. made an order on the summons that the liquidator should pay to *E.* all the rent accrued since the commencement of the winding-up:—*Held*, on appeal, that no case has gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accrued since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property of which the company is lessee, and that the facts

COMPANY—*continued.*

that the liquidator left the company's plant and machinery where he found them, that he had them valued for sale in May, 1880, and that he took no steps to surrender the company's interest in the colliery and the 163 acres, did not entitle the landlord to distrain or to be paid in full, and that the summons ought to have been dismissed. *In re* Oak Pits Colliery Company **C. A. 322**

9. —— *Winding-up—Contributory—Liquidation Petition — Trustee — Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 40—*Period of Six Months* —"*Held*"—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89)—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 15, 94, 95, 115.] A contributory of a company may present a petition to wind up the company where his name appears on the register as the holder of shares, though a trustee may have been appointed under a liquidation petition filed by such contributory, during the period of six months mentioned in s. 40 of the *Companies Act*, 1867.—The word "*held*" in such section has no technical meaning, the true meaning of the word being that the name of the contributory has been on the register as the holder of shares for the period in question. *In re* Wala Wynaad Indian Gold Mining Company - - - **849**

10. —— *Winding-up—Costs of Official Liquidator—Application for Leave to appeal—Rules of Court*, 1875, *Order* LV.] On the 29th of July, 1881, a petition was presented to wind up a company. On the same day an order was made by *Bacon*, V.C., on an application by *A.* that his name should be taken off the register of shareholders and his money returned to him. This order was made in ignorance that a winding-up petition had been presented, and was drawn up as of the 24th of August, 1881. On the 26th of August a winding-up order was made by *Hall*, V.C. *A.* claimed as a creditor for the moneys ordered to be refunded to him, and his claim was allowed. The liquidator was advised he ought to obtain a decision on the question whether V.C. *Bacon's* order was right, he thereupon took out a summons to have the claim of *A.* to rank as a creditor disallowed. *Kay*, J., on the 24th of June, 1882, dismissed the summons as misconceived, since he had no jurisdiction to disturb V.C. *Bacon's* order, and refused to give the liquidator his costs out of the estate. The liquidator on the 29th of June took out a summons for leave to appeal against V.C. *Bacon's* order of the 24th of August, 1881, and *Kay*, J.'s order of the 24th of June, 1882. *Kay*, J., dismissed this summons with costs, refusing the liquidator his costs out of the estate. The liquidator applied to vary this order:—*Held*, that an official liquidator is a person who as a general rule is entitled to his costs out of the estate, and that under Order LV. an appeal would lie.—But, *held*, that as the application of the 24th of June was a manifest mistake it was competent to the Judge below to refuse the liquidator his costs of it, and the Court of Appeal would not interfere with his decision.—A liquidator, though in some sense a trustee, is a paid agent bound to discharge his duties with reasonable care and skill, and may be deprived of costs for a mistake which would not be sufficient to disentitle an ordinary gratuitous trustee to costs.

COMPANY—*continued.*

—*Held*, that a liquidator who applies for leave to appeal from an order is as a general rule entitled to the costs of the application, but they will be refused if the appeal would be frivolous.—*Held*, that if the application of the 29th of June had only been for leave to appeal against the order of the 24th of June, 1882, the Court of Appeal would not have interfered as to the costs, but that an application for leave to appeal against the order of the 24th of August, 1881, was reasonable, and that as the including in the application liberty to appeal against the other order did not increase the costs, the liquidator must be allowed his costs of that application out of the estate.—Leave to appeal against the order of the 24th of August, 1881, so as to entitle the liquidator to costs in any event, was however refused on the ground of lapse of time.—The principles upon which applications by official liquidators for leave to appeal are to be dealt with, considered. *In re* Silver Valley Mines - - **C. A. 381**

11. —— *Winding-up—Execution—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 163—*Bill of Sales Registration Act* (17 & 18 *Vict. c.* 36), *s.* 1.] Where an execution against the goods of a company which is being wound up is avoided by the *Companies Act*, 1862, s. 163, it is avoided altogether, and the creditor retains no interest under it.—Whether, under 17 & 18 Vict. c. 36, s. 1, the taking in execution of goods comprised in an unregistered bill of sale defeated the bill of sale wholly or only to the extent necessary to give effect to the execution, *quære*.—The position in *Richard* v. *James* (Law Rep. 2 Q. B. 285), that it has the former effect, doubted. *In re* Artistic Colour Printing Company. *Ex parte* Fourdrinier - **C. A. 510**

12. —— *Winding-up—Wishes of Creditors—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 91.] In determining whether regard should be paid to the wishes of creditors who oppose the making of a winding-up order, the Court ought to consider not only the number of the creditors and the amount of their debts, but also the reasons which they assign for their conclusion.—The *primâ facie* right of an unpaid creditor of a company to a winding-up order is rebutted when it is shewn that a large mass of other creditors oppose the making of such an order.—A creditor's winding-up petition ordered to stand over for six months upon terms similar to those imposed in *In re St. Thomas' Dock Company* (2 Ch. D. 116). *In re* Great Western (Forest of Dean) Coal Consumers' Company [769

—— Life insurance company—Foreign country
See Insurance Company. [837

—— Railway company - - - 309
See Railway Company.

COMPENSATION—Lands Clauses Act - 143
See Lands Clauses Act. 1.

COMPULSORY POWERS—Railway company 143
See Lands Clauses Act. 1.

CONCURRENT SUITS—Conduct of proceedings—Lancaster Palatine Court - 647
See Practice. 7.

CONDITION—Will - - - 431, 838
See Will. 1, 5.

CONDUCT OF PROCEEDINGS - - 647
See Practice. 7.

CONSIDERATION—Statement of—Bill of sale
See Bill of Sale. 1, 2. [73, 543

CONSOLIDATED ORDER XXIII., r. 10 - 360
See Practice. 5.

CONTEMPORANEOUS DEEDS—Priority - 762
See Deed.

CONTEMPT—Discharge of prisoner - 230
See Practice. 4.

CONTINGENT LIABILITY—Covenant not to revoke will - - - - 780
See Bankruptcy. 7.

CONTRACT—Forfeiture—Liquidated damages
See Penalty. [243

—— With lunatic - - - - 615
See Lunatic. 2.

CONTRIBUTION—Mortgage of land and charge on shares - - - - 583
See Company. 5.

CONTRIBUTORY—Winding-up petition - 849
See Company. 9.

CONVERSION—Bequest to separate use—Power of anticipation - - - 748
See Will. 12.

CONVEYANCING AND LAW OF PROPERTY ACT - - - - - 169
See Mortgage. 2.

—— - - - - - - 41
See Settled Estates Act. 1.

COPY—Bill of sale—Registration - - 871
See Bill of Sale. 3.

COPYRIGHT—*Dramatic Piece—Musical Composition—Printing and publishing—Acting or performing*—3 & 4 *Will.* 4, *c.* 15, *s.* 1—5 & 6 *Vict. c.* 45, *ss.* 2, 20, 22.] The publication in this country of a dramatic piece, or musical composition, as a book before it has been publicly represented or performed does not deprive the author of such dramatic piece or musical composition, or his assignee, of the exclusive right of representing or performing it. Chappell *v.* Boosey 232

2. —— *Illustrated Catalogue—Book of Engravings—Copyright Act* (5 & 6 *Vict. c.* 45). The Plaintiffs, who were upholsterers, published an illustrated catalogue of articles of furniture which was duly registered under the *Copyright Acts* as a book. The illustrations were engraved from original drawings made by artists employed by the Plaintiffs, but the book contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale, but was used by the Plaintiffs as an advertisement. The Defendants published an illustrated catalogue, many of the illustrations in which were copied from those in the Plaintiffs' book:—*Held*, by the Court of Appeal (affirming the decision of Vice-Chancellor *Hall*), that the Plaintiffs were entitled to an injunction restraining the Defendants from publishing any catalogue, containing illustrations copied from the Plaintiffs' book.—A collection of prints published together in a volume is a book within the meaning of the *Copyright Acts*, and the proper subject of copyright, though it contains no such letterpress as could be the subject of copyright, and it makes no difference that the

COPYRIGHT—*continued.*
book is not published for sale but only used as an advertisement.—*Cobbett* v. *Woodward* (Law Rep. 14 Eq. 407) overruled. MAPLE & Co. *v.* JUNIOR ARMY AND NAVY STORES - C.A. 369

COSTS—Administration action—Bankrupt defendant - - - - 862, 865
See ADMINISTRATION ACTION. 2, 5.

—— Affidavit—Prolixity - - - 835
See PRACTICE. 13.

—— Injunction against sheriff - - 69
See SHERIFF.

—— Liberty to attend - - - 830
See PRACTICE. 9.

—— Official liquidator - - - 381
See COMPANY. 10.

—— Official solicitor - - - - 776
See PRACTICE. 6.

—— Third party - - - - 198
See PRACTICE. 21.

—— Witness - - - - - 831
See PRACTICE. 15.

COUNTER-CLAIM - - 138, 175, 802
See PRACTICE. 10, 11, 12.

COVENANT—Not to revoke will—Proof in bankruptcy - - - - 780
See BANKRUPTCY. 7.

—— Not to revoke will—Public policy - 780
See WILL. 11.

—— Restrictive—Conveyance settled by Judge
See VENDOR AND PURCHASER. 2. [466

—— Restrictive—Objection to title - 95
See VENDOR AND PURCHASER. 1.

CREDITORS — Company — Winding-up—Wishes of majority - - - - 769
See COMPANY. 12.

—— Resolution of—Direction to trustees 397
See BANKRUPTCY. 11.

CROSS-EXAMINATION—Affidavit—Withdrawal
See PRACTICE. 14. [642

CUSTOM OF BOROUGH—Individual benefit of freemen - - - - 111
See MUNICIPAL CORPORATION.

CUSTOM OF COUNTRY - - - 18
See LANDLORD AND TENANT. 2.

DAMAGES—Liquidated - - - 243
See PENALTY.

—— Undertaking as to - - - 421
See PRACTICE. 18.

DEBENTURE—Contemporaneous deeds—Priority of operation - - - - 762
See DEED.

—— Investment of money—Misappropriated by directors - - - - 492
See COMPANY. 4.

—— Right to—Rolling stock - - 309
See RAILWAY COMPANY.

DEBT—Direction to pay debts—Estate of trustees
See WILL. 2. [790

—— Relinquishment of—Condition - 431
See WILL. 1.

DEBTOR'S SUMMONS—Act of bankruptcy—Discontinuance of trade - - 394
See BANKRUPTCY. 1.

—— Act of bankruptcy available for adjudication - - - - 605
See BANKRUPTCY. 9.

DECLARATION OF FUTURE RIGHTS—Appeal 1
See PRACTICE. 2.

DEED—*Deeds executed on same Day—Priority of Operation—Debentures of Company.*] When two deeds relating to the same subject-matter are executed on the same day the Court will inquire which of them was executed first.—But if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or that one should take effect in priority to the other, the Court will presume that they were executed in such an order as to give effect to the manifest intention.—One hundred and fifty debentures of a company, each for £100, were all sealed with the company's seal on the same day. They bore the numbers 501 to 650. Each of the first hundred (Nos. 501 to 600) contained a provision that it "and all other debentures of the company to the amount of £10,000 (the amount intended to be now borrowed by the company), or such of them as shall for the time being be due and unpaid, shall be all taken and considered, as between the company and the several holders thereof, as one debenture, and shall not be entitled to any preference or priority by reason of priority of date or otherwise, but shall be paid *pari passu* out of the funds of the company." Each of the other fifty debentures contained a similar provision, substituting the sum of £5000 for £10,000. There was evidence that the company's seal was affixed to the debentures in the order of their numbers, beginning with the earliest. The company being in liquidation:—*Held*, that the holders of the debentures for £10,000 were entitled to priority over the holders of the debentures for £5000. GARTSIDE *v.* SILKSTONE AND DODWORTH COAL AND IRON COMPANY - - - - - 702

DEFEASANCE—Bill of sale - - - 73
See BILL OF SALE. 2.

DELAY—Expunging proof - - - 537
See BANKRUPTCY. 6.

—— Misconduct of directors - - 149
See COMPANY. 2.

DEPOSIT—Foreign life insurance company 837
See INSURANCE COMPANY.

—— Forfeiture of - - - - 243
See PENALTY.

DEPOSITIONS—Bankruptcy—Right of witness to copy - - - - - 439
See BANKRUPTCY. 12.

DESCRIPTION OF RESIDENCE - - 871
See BILL OF SALE. 3.

DEVISE—Condition - - - - 431
See WILL. 1.

—— Estate of trustees—Direction as to debts 790
See WILL. 2.

—— Repugnancy - - - - 838
See WILL. 5.

DIRECTOR—Election of—Filling up casual vacancy - - - - 183
See Company. 1.
—— Misconduct of - - 149, 492, 519
See Company. 2, 3, 4.
DISCHARGE—Prisoner in custody for contempt
See Practice. 4. [230
DISCHARGE IN BANKRUPTCY - - 780
See Bankruptcy. 7.
DISCOVERY—Books of account of bankrupt 868
See Bankruptcy. 2.
DISCRETION—Court of Bankruptcy - 553
See Bankruptcy. 4.
—— Trustees - - - 571, 576, n.
See Will. 9, 10.
DISPUTED TITLE—Partition suit - - 674
See Partition Suit.
DISSOLUTION OF MARRIAGE—Dower - 164
See Dower.
DISTRESS—Bankruptcy—Attornment clause in mortgage - - - - 442
See Bankruptcy. 3.
—— Executory agreement for lease - 9
See Landlord and Tenant. 1.
DIVIDEND—Payment out of capital 149, 519
See Company. 2, 3.
DIVORCE—Dower - - - - 164
See Dower.
DOCUMENTS—Production of—Books of account of bankrupt - - - - 868
See Bankruptcy. 2.
—— Setting out—Affidavit—Costs - 835
See Practice. 13.
DOMICIL—Foreign—Succession duty—Fund in Court - - - - 100
See Succession Duty.
DOWER—*Husband and Wife—Divorce*—20 & 21 *Vict. c.* 85.] A wife having obtained a decree for dissolution of marriage in the Court for Divorce and Matrimonial Causes on the ground of her husband's misconduct:—*Held*, by so doing to have lost her right to dower. Frampton *v.* Stephens - - - - - 164
DRAMA—Copyright in - - - 232
See Copyright. 1.
DUCHY OF LANCASTER—Attorney-General of—Right to attend proceedings in lunacy
See Lunatic. 3. [613

EASEMENT—Compensation—Lands Clauses Act
See Lands Clauses Act. 1. [143
ELECTION FOR PARLIAMENT — Election expenses - - - - 408
See Parliament.
ENGRAVINGS—Book of—Copyright - 369
See Copyright. 2.
EQUIVALENT—Use of - - - 720
See Patent.
EVIDENCE - - - - 642, 835
See Practice. 13, 14.
—— Bankruptcy - - - - 439
See Bankruptcy. 12.
—— Will proved in *Victoria* - - 674
See Partition Suit.
EX PARTE INJUNCTION—Parting with legal estate - - - - 490
See Practice. 17.
EXAMINATION — Bankrupt's dealings or property - - - - 601
See Bankruptcy. 13.
EXECUTION—Against company being wound up
See Company. 11. [510
EXECUTION CREDITOR—Wrongful seizure 69
See Sheriff.
EXECUTOR—Action against—Tort by testator
See Practice. 8. [484
—— Protection of—Unregistered judgment 189
See Administration Action. 4.
—— Wilful default - - - - 757
See Administration Action. 1.
EXPENSES—Election for Parliament - 408
See Parliament.
—— Witness - - - - - 831
See Practice. 15.
EXPUNGING PROOF—Bankruptcy - 537
See Bankruptcy. 6.

FAILURE OF PARTICULAR ESTATE - 790
See Will. 2.
FATHER—Wishes of—Religious education 817
See Infant. 1.
FIDUCIARY RELATION—Sale by mortgagees—Purchase by their secretary - 857
See Mortgage. 4.
FIERI FACIAS—Wrongful seizure - - 69
See Sheriff.
FOREIGN LIFE INSURANCE COMPANY — Deposit - - - - 837
See Insurance Company.
FORFEITURE—Claim of—Will - - 278
See Will. 4.
—— Deposit - - - - - 243
See Penalty.
FLINTS —Right to sell - - - 18
See Landlord and Tenant. 2.
FRAUD—Appointment—Portions - - 332
See Power.
FRAUDS, STATUTE OF - - - 442
See Bankruptcy. 3.
FRAUDULENT CONVEYANCE - - 553
See Bankruptcy. 4.
FREEMAN—Municipal corporation—Custom of borough - - - - 111
See Municipal Corporation.
FRIENDLY SOCIETY—Libel—Injunction 798
See Libel.
FUND IN COURT—Proceeds of real estate—Succession duty—Illegitimate children 100
See Succession Duty.
FUTURE RIGHTS—Declaration of—Appeal 1
See Practice. 2.

GOVERNMENT STOCK—Local board—Vesting—Duty of Bank of England - 176
See Local Government Acts. 1.
GRANT—Implied—Right to support - 559
See Support.

GUARDIAN—Religious education - - 817
See INFANT. 1.

HOUSE—Direction to block up - - 667
See WILL. 3.

HUSBAND AND WIFE—Dower - - 164
See DOWER.

—— Gift to separate use - - - 748
See WILL. 12.

—— Separate estate—Evidence - - 657
See WILL. 13.

ILLEGALITY—Right of Attorney-General to sue - - - - - 752
See PRACTICE. 16.

ILLEGITIMATE CHILDREN—Succession duty—Fund in Court - - - 100
See SUCCESSION DUTY.

ILLEGITIMATE PERSON—Lunatic - 613
See LUNATIC. 3.

IMPLICATION—Contract with lunatic - 615
See LUNATIC. 2.

—— Grant - - - - - 559
See SUPPORT.

INCOME TAX—Bequest of annuity free from all deductions - - - - 105
See WILL. 6.

INCORPORATION OF DISTRICT—Local board
See LOCAL GOVERNMENT ACTS. 1. [176

INDEMNITY—Misconduct of director—Shareholders and creditors - - 149
See COMPANY. 2.

INDORSEMENT—Order—New practice - 360
See PRACTICE. 5.

INFANT—*Guardian—Religious Education—Wishes of deceased Father—Abandonment of Father's Right.*] An Englishman, who was a Protestant, in October, 1869, married in *Germany* a German lady who was a Roman Catholic. Previously to the marriage a written agreement was signed by them both, which provided that the children (if any) of the marriage should be educated in the Roman Catholic faith. After the marriage the husband and wife lived together in *Germany*. He never attended a Protestant place of worship, but often went to mass with his wife. There were three children of the marriage—a daughter born in 1871, a son born in 1873, and another daughter born, just after the death of the father, in April, 1876. The first two children were, with the father's knowledge, baptized as Roman Catholics, and, in the case of the son, a Roman Catholic priest in *England*, whom the father knew, acted as godfather at the request of the father himself. The father allowed the mother to bring up the two children as Roman Catholics. He died intestate, and had not appointed any guardian to his children. His only property was some real estate in *Lancashire*, worth more than £2000 a year, which passed to his infant son as his heir-at-law, subject to the life estate of the paternal grandfather, who died in 1881. The mother had no fortune of her own. She, as next friend of the infant son, in 1882 took out a summons for the appointment of

INFANT—*continued.*

a guardian and the settlement of a scheme for his maintenance and education. She desired that he should be educated in the Roman Catholic faith. The paternal relations, on the contrary, wished that the infant should be brought up as a Protestant:—*Held*, that the father by his conduct had abandoned his right to have the child brought up in his own faith, and had indicated a wish that he should be brought up as a Roman Catholic:—*Held*, also, that under the circumstances it would be most for the benefit of the infant that he should be educated in the Roman Catholic faith.—*Hawksworth* v. *Hawksworth* (Law Rep. 6 Ch. 539), *Andrews* v. *Salt* (Law Rep. 8 Ch. 622), and *Hill* v. *Hill* (10 W. R. 400) considered. *In re* CLARKE - - - - - 817

2. —— *Real Estate—Power of Court to mortgage for Repairs.*] When an infant was absolutely entitled subject to certain trusts to the beneficial interest in real estate, the legal estate being in trustees:—*Held*, that the Court had jurisdiction to direct the raising of money by means of a mortgage of the estate, for the purpose of paying the cost of repairs certified by the Chief Clerk to be absolutely necessary. *In re* JACKSON. JACKSON *v.* TALBOT - - - - 786

INJUNCTION—Application of funds of trade union - - - - 194
See TRADE UNION.

—— - - - - 421, 490, 752
See PRACTICE. 16, 17, 18.

—— Libel on friendly society - - 798
See LIBEL.

INSURANCE COMPANY—*Practice—Foreign Life Assurance Company—Return of Deposit—Accumulation Fund in Foreign Country—Life Assurance Companies Acts, 1870 to 1872—Life Assurance Companies Act*, 1870, *s.* 3—*Board of Trade Rules, 28th August*, 1872, *r.* 6.] On a petition by depositors under the *Life Assurance Companies Acts*, 1870 to 1872, and the Board of Trade Rules thereunder, for payment out to them of the £20,000 required to be deposited in Court by a foreign life assurance company before commencing business in this country, the Court will, having regard to rule 6 of the Board of Trade Rules, make the order notwithstanding that the *Life Assurance Companies Act*, 1870, sect. 3, enacts that the deposit shall be returned "to the company."—The life assurance fund required by that section to have been accumulated prior to the return of the deposit may consist of accumulations already existing abroad and arising from the original business of the company. *In re* COLONIAL MUTUAL LIFE ASSURANCE SOCIETY - - 837

INTEREST—Legacy - - - - 657
See WILL. 13.

INTERLOCUTORY INJUNCTION - - 421
See PRACTICE. 18.

INTESTACY—Declaration of - - 667
See WILL. 3.

INVESTMENT—Breach of trust - - 302
See COMPANY. 6.

—— Purchase-money—Lands Clauses Act 228
See LANDS CLAUSES ACT. 2.

IRREGULARITY—Order under Settled Estates Act - - - - - - 41
See Settled Estates Act. 1.

JOINDER OF ACTIONS—Claim for recovery of land—Counter-claim - - 138
See Practice. 10.

JUDGE—Colonial—Salary of—Bankruptcy 85
See Bankruptcy. 8.

JUDGMENT—Unregistered—Priority over simple contract debts - - - 189
See Administration Action. 4.

JURISDICTION—Bankruptcy - 553, 601
See Bankruptcy. 4, 13.

—— Infant's real estate - - - 786
See Infant. 2.

JURY—Trial by - - - - 134
See Practice. 22.

LANCASTER COURT—Concurrent suits - 647
See Practice. 7.

LANDLORD AND TENANT—*Executory Agreement for Lease—Right of Distress—Minimum Rent—Rent payable in Advance.*] The Defendant on the 29th of May, 1879, agreed to grant and the Plaintiff to accept a lease of a mill for seven years at the rent of 30*s.* a year for each loom run, the Plaintiff not to run less than 540 looms. The lease to contain such stipulations as were inserted in a certain lease of the 1st of May, which was a lease at a fixed rent made payable in advance, and contained a stipulation that there should at all times be payable in advance on demand one whole year's rent in addition to the proportion, if any, of the yearly rent due and unpaid for the period previous to such demand. The plaintiff was let into possession and paid rent quarterly, not in advance, down to the 1st of January, 1882, inclusive, having run in 1881 560 looms. In March, 1882, the Defendant demanded payment of £1005 14*s.* (£840 as one whole year's rent for 560 looms at 30*s.*, and £165 14*s.* as the proportionate part of the rent from the 1st of January last), and put in a distress. The Plaintiff thereupon commenced his action for damages for illegal distress, for an injunction, and for specific performance, and moved for an injunction. *Fry*, J., granted the injunction on the terms of the Plaintiff paying the £1005 14*s.* into Court. The Plaintiff appealed.—*Held*, that since the *Judicature Acts* the rule no longer holds that a person occupying under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent, but that he is to be treated in every Court as holding on the terms of the agreement:—*Held*, therefore, that the Plaintiff holding under the agreement was subject to the same right of distress as if a lease had been granted, and that if under the terms of the lease a year's rent would have been payable in advance on demand a distress for that was lawful.—*Semble*, that such lease ought to reserve a minimum rent of £810 (30*s.* a piece on 540 looms), and that the stipulation in the lease of the 1st of May as to payment in advance would be applicable to such minimum rent though not to the whole rent. And the Defendant being willing to submit to the injunction on having £810 paid into Court, order varied accordingly, the Court being inclined to the view that there was a right of distress for that amount though the time had not arrived for finally determining the question. Walsh *v.* Lonsdale [C. A. 9

LANDLORD AND TENANT—*continued.*

2. —— *Waste—Agricultural Tenant—Selling Flints—Reservation of Mines and Minerals—Custom of Country—Repairs—Finding Materials—Damage.*] By an agreement for a lease the tenant agreed to cultivate the land according to the most approved system of husbandry and to use it for agricultural purposes only, and to commit no waste. The lessor reserved "all mines and minerals, sand, quarries of stone, brickearth, and gravel pits." The farm was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and it was necessary to remove them in order to cultivate the land effectually. The tenant removed the flints which came to the surface in the ordinary course of agricultural operations and sold them, and there was evidence that it was the custom of the country for tenants to do so, when not prohibited by their leases:—*Held*, by *Kay*, J., and by the Court of Appeal, that such a custom was reasonable and good.—In ascertaining the nature of an agricultural custom regard is to be had not so much to what the witnesses state to be their opinion as to the extent of the custom, as to what they prove to have been publicly done throughout the district.—*Held*, further, that the reservation of minerals in the agreement did not indicate an intention to exclude the custom so as to deprive the tenant of this right.—The tenant agreed to keep the buildings in good repair. The landlord, by a subsequent clause, agreed, on notice from the tenant, to find materials for repairs, the tenant doing the drawing and labour. A barn requiring repair the tenant gave the landlord notice to find materials, which he failed to do for more than the allowed period. The barn remained out of repair, in consequence of which a storm damaged the roof, and the rain entered and damaged the tenant's corn:—*Held*, by *Kay*, J., that the tenant was not entitled to damages for the injury done to his corn, for that his obligation to repair was not conditional on the landlord finding materials, and that the damage arose from his own failure to carry out his part of the contract, and that he ought to have repaired, and claimed the cost of the materials from the landlord. Tucker *v.* Linger - - - - - C. A. 18

—— Attornment clause in mortgage—Bankruptcy - - - - 442
See Bankruptcy. 3.

—— Winding-up of company - - 322
See Company. 8.

LANDS CLAUSES ACT—*Railway—Compulsory Powers—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 85—*Easement—Compensation.*] A railway company was entitled by a special Act to acquire compulsorily an easement of tunnelling under land, unless a jury should determine that such easement could not be acquired by the company without material detriment to the remainder of such land:—*Held*, that the company might

LANDS CLAUSES ACT—*continued.*
enter upon the land for the purpose of making the tunnel under sect. 85 of the *Lands Clauses Consolidation Act* upon depositing the value of the easement, and could not be compelled to deposit the value of the whole land. HILL *v.* MIDLAND RAILWAY COMPANY - - - - 143

2. —— (8 *Vict. c.* 18), *s.* 69—*Reinvestment—Tenant for Life—Remainderman—Trust Estate—Permanent Repairs—Recouping Trustee.*] Under a will *A.* was tenant for life of a copyhold house and two leasehold houses. The latter having been taken under the *Lands Clauses Consolidation Act*, the purchase-money was paid into Court under the 69th section. The trustee of the will having entered into a contract for putting the copyhold house into permanent repair, and there being no trust funds in hand out of which the expense could be defrayed, the Court, upon a petition for re-investment presented by the tenant for life and the trustee, and without requiring service on the remaindermen, ordered the contract price of the repairs to be paid to the trustee out of the fund in Court, and the remainder to be invested in consols and the dividends paid to the trustee. *In re* ALDRED'S ESTATE - - 228

—— Superfluous lands - - - 95
See VENDOR AND PURCHASER. 1.

LAPSE—Devise on condition - - 431
See WILL. 1.

LAPSE OF TIME—Expunging proof - 537
See BANKRUPTCY. 6.

LEASE—Agreement for—Custom of country 18
See LANDLORD AND TENANT. 2.

—— Agreement for—Distress - - 9
See LANDLORD AND TENANT. 1.

LEGACY—For life—Action by remainderman—Payment into Court - - 121
See ADMINISTRATION ACTION. 3.

—— Interest on - - - - 567
See WILL. 13.

LEGAL DEMAND - - - - 278
See WILL. 4.

LEGAL ESTATE—Injunction against parting with - - - - 490
See PRACTICE. 17.

LIBEL—*Injunction—Privilege—Friendly Society*—38 & 39 *Vict. c.* 60, *s.* 23.] An injunction can be granted to restrain a libel likely to injure a friendly society or joint stock company.—A member of a friendly society issued to persons not members of the society circulars containing inaccurate statements as to the financial condition of the society:—*Held*, that such circulars ought to be restrained by injunction. HILL *v.* HART DAVIES - - - - - 798

LIBERTY TO ATTEND—Costs - - 830
See PRACTICE. 9.

LIEN—Company—Shares—Debt due from holder - - - - 583
See COMPANY. 5.

—— Company—Shares in name of trustee 302
See COMPANY. 8.

—— Vendor's, for unpaid purchase-money. 685
See VENDOR AND PURCHASER. 3.

LIFE INSURANCE—Foreign country - 837
See INSURANCE COMPANY.

LIMITATION, STATUTES OF—Misappropriation of money by directors - - - 519
See COMPANY. 3.

—— Supply of necessaries to lunatic - 615
See LUNATIC. 2.

LIQUIDATED DAMAGES - - - 243
See PENALTY.

LIQUIDATION - - - - 594
See BANKRUPTCY. 5.

LIQUIDATOR—Official—Costs—Appeal - 381
See COMPANY. 10.

LIS PENDENS—Protection of property - 490
See PRACTICE. 17.

LOCAL BOARD - - - 176, 621
See LOCAL GOVERNMENT ACTS. 1, 2.

LOCAL GOVERNMENT ACTS—*Local Board—Incorporation of District—Vesting of Property—Government Stock—Bank of England—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 310—*National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *s.* 22.] The words "council of such borough" in sect. 310 of the *Public Health Act*, 1875, mean the mayor, aldermen, and burgesses acting by the council.—The effect of the section, therefore, is that, when the district of a local board is incorporated as a borough all the property of the board (including property acquired by them by purchase after the passing of the Act) vests at once in the corporation, without the necessity of any conveyance or transfer.—In such a case the *Bank of England* are bound, on the request of the corporation, to register in their corporate name Government stock previously standing in the books of the bank in the name of the local board, without requiring any transfer to be executed. CORPORATION OF HYDE *v.* BANK OF ENGLAND 176

2. —— *Powers of Local Board—"New Street"—Bringing forward Buildings—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 2—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98) *s.* 34—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 156, 157—*Practice—Motion to vary Minutes—Production of Registrar's Note.*] *Held*, by the Court of Appeal (reversing the decision of *Fry*, J.), that the word "new streets" in sect. 34 of the *Local Government Act*, 1858, are not confined to streets which are constructed for the first time out of grass land or other vacant land, but apply also to an old country road in the neighbourhood of a town which, by the building of houses on each side of it, has recently become or is gradually becoming a street in the popular sense of the term, though it was previously a street within the interpretation clause of the *Public Health Act*, 1848:—*Held*, therefore, that the local board had authority to make by-laws authorizing them to regulate the position of buildings in such a street with a view to keeping the street of a certain width. ROBINSON *v.* LOCAL BOARD FOR BARTON [C. A. 621

LOCKE KING'S ACT—Mortgage of land and charge on shares - - - 583
See COMPANY. 5.

LUNATIC—*Allowance to Poor Relations.*] The income of a lunatic being much more than was

LUNATIC—*continued.*
required for his maintenance, a respectable aged clergyman, a first cousin, and one of the next of kin of the lunatic, who had been reduced to indigence by unavoidable misfortune, applied for an allowance out of the surplus income. It was not shewn that the lunatic had ever known of the existence of the applicant, and it was not suggested that any evidence could be obtained that the lunatic, when sane, had ever done anything for him or expressed any intention in his favour:—*Held*, that the application must be refused.—The practice of granting allowances out of a lunatic's property to relations for whom he is under no legal obligation to provide, is rather to be narrowed than to be extended. *In re* Evans **C. A. 297**

2. —— *Maintenance, out of what Fund—Allowance to Relative for past Maintenance—Statute of Limitations—Supply of Necessaries to Lunatic.*] Where a lunatic has property to which he is entitled for life under a settlement as well as property to which he is absolutely entitled, the Court will apply the life interest in the first place towards his maintenance; unless the trustees of the settled property have an absolute discretion whether to employ the whole or any part of the income for the lunatic's benefit.—Therefore where property was held upon trust to pay the income in such way, at such time, and in such manner as the trustees should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was *held* that the trustees had no such discretion as would oust the jurisdiction of the Court to apply the whole of the income in the lunatic's maintenance in exoneration of her absolute property.—*Gisborne* v. *Gisborne* (2 App. Cas. 300) distinguished.—The brother of a lunatic lady not so found by inquisition advanced money for the maintenance of his sister for several years under circumstances which left it doubtful whether he intended it for a gift or expected to be repaid. He died, and his sister was then found to be lunatic by inquisition. His executors having brought in a claim against the lunatic's estate for repayment of the advances, the Court made an allowance to the testator's estate for past maintenance, but limited it to advances made within six years before the testator's death.—Whether a person who supplies a lunatic with necessaries, knowing him to be lunatic, can maintain an action against him on the ground of an implied contract *quære*. *In re* Weaver - - **C. A. 615**

3. —— *Parties entitled to attend Proceedings — Illegitimate Person — Attorney-General — Attorney-General of Duchy of Lancaster.*] A lunatic, who was illegitimate and unmarried, was resident in *Lancashire*, and part of her property consisted of copyholds held of the Duchy of *Lancaster*:—*Held*, that the Attorney-General of the Duchy of *Lancaster* was not entitled to attend the proceedings in the lunacy; the Queen's rights being sufficiently represented by the Queen's Attorney-General, who had leave to attend. *In re* Kershaw - - - - - **C. A. 613**

MAINTENANCE—Lunatic - - - 615
See Lunatic. 2.

MAJORITY OF CREDITORS—Winding-up of company - - - - **769**
See Company. 12.

MEETING OF COMPANY—Filling up vacancy among directors - - - **183**
See Company. 1.

MINES AND MINERALS—Custom of country—Selling flints - - - **18**
See Landlord and Tenant. 2.

MINISTER—Removal of—Leave of Charity Commissioners - - - - **513**
See Charity. 1.

MINUTES—Motion to vary - - - **621**
See Practice. 23.

MISAPPROPRIATION OF FUNDS—Directors
See Company. 4. [**492**

MISCONDUCT OF DIRECTORS - **149, 492, 519**
See Company. 2, 3, 4.

MISDESCRIPTION—Grantor—Bill of sale **73**
See Bill of Sale. 2.

MONTHLY TENANCY—Uncertain rent—Distress
See Bankruptcy. 3. [**442**

MORTGAGE—*Mortgagee in Possession—Sale by Mortgagee—Use and Occupation—Permanent Improvements.*] If a mortgagee in possession, or a mortgagee selling under his power of sale, has reasonably expended money in permanent works on the property, he is entitled on *primâ facie* evidence to that effect to an inquiry whether the outlay has increased the value of the property, and if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value. And in such case it is immaterial whether the mortgagor had notice of the expenditure.—Notice to the mortgagor is only material when the expenditure is unreasonable, for the purpose of shewing that he acquiesced in it.—*Sandon* v. *Hooper* (6 Beav. 246; 14 L. J. (Ch.) 120) commented on.—A mortgagee in possession sold the property under his power of sale, a day being fixed for the completion of the sale and for letting the purchaser into possession. At the request of the purchaser the mortgagee let him into possession four months before the appointed day, but did not require him to pay any rent:—*Held*, in an action by the mortgagor for ascertaining the amount of the balance due to him, that the mortgagee could not be charged with an occupation rent for the interval during which the purchaser had been in possession before the appointed day.—Whether in such a case the mortgagee might be charged with wilful default in not requiring a rent from the purchaser, *quære*.—The decision of *Kay*, J., reversed. Shepard *v.* Jones [**C. A. 469**

2. —— *Redemption Action—Order for Sale—Conduct of Sale — Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 25.] Under sect. 25 of the *Conveyancing and Law of Property Act*, 1881, the Court has power in a redemption action to order a sale of the mortgaged property on an interlocutory application made before the trial of the action by a person interested in the equity of redemption.—In an action by the owner of the equity of redemption of property subject to several mortgages for the redemption of the mortgages, the Plaintiff, soon after the

MORTGAGE—*continued.*
issue of the writ, applied by summons for an order giving him liberty to sell the mortgaged property, and asking that he might have the conduct of the sale. The first and second mortgagees opposed the application, the others supported it:—*Held*, that an order for sale ought to be made, but that a reserved price must be fixed large enough to cover what was due on the first and second mortgages, and that the Plaintiff must give security for the costs of the sale. The conduct of the sale was given to the Plaintiff on the ground that he was more interested than the first or second mortgagees in obtaining as large a price as possible for the property.—And it was ordered that the sale should take place out of Court, and that the proceeds of sale should be paid into Court. WOOLLEY *v.* COLMAN - - - - 169

3. —— *Successive Mortgages — Possession of Title Deeds — Negligence of First Mortgagee—Priority.*] *P.* mortgaged estates to *M.*, and was allowed to retain possession of the title deeds. He subsequently mortgaged one of the estates to *A. B.*, who obtained possession of the deeds, and all the estates to *C.*, who advanced his moneys after ascertaining the position of the deeds, and upon the faith that *A. B.* was the only prior mortgagee:—*Held*, that *M.*, by not obtaining possession of the deeds, enabled *P.* to deal with his estates as an unencumbered owner; that *A. B.* having been diligent in obtaining the deeds acquired priority, and that *C.* also having been diligent in ascertaining that *A. B.* had the deeds, apparently as first mortgagee, the same principle extended to him, and he also had priority over *M.* —The case of *Perry-Herrick* v. *Attwood* (25 Beav. 205; 2 De G. & J. 21) explained and followed. CLARKE *v.* PALMER - - - - 124

4. —— *Sale by Mortgagees — Purchase by Secretary of Mortgagees.*] At a sale by auction under the direction of a building society as mortgagees, the secretary of the society openly bid for and became the purchaser of two lots on his own account. There was no proof of undervalue.—*Held*, that under the circumstances the sale to the secretary could not be maintained as against the mortgagor.—*Robertson* v. *Norris* (1 Giff. 421) disapproved of. MARTINSON *v.* CLOWES - 857

—— Attornment clause - - - 442
See BANKRUPTCY. 3.

MORTGAGEE—In possession - - 469
See MORTGAGE. 1.

—— Partition suit by - - - 674
See PARTITION SUIT.

MOTION—For judgment—Admissions - 716
See PRACTICE. 1.

—— To discharge order in Chambers - 131
See PRACTICE. 3.

—— To vary minutes - - - 621
See PRACTICE. 23.

MUNICIPAL CORPORATION—*Action against, by Freemen on behalf—Property of Borough applied for individual Benefit of Freemen—Custom of Borough—Municipal Corporations Act*, 1835 (5 & 6 *Will.* 4, *c.* 76), *s.* 2—*Pleading.*] In an action by some (on behalf of all) of the freemen of a borough to establish the right of all individual freemen to share for their private benefit the net proceeds of certain properties vested in the corporation:—*Held*, on demurrer, that the effect of the saving of rights in sect. 2 of the *Municipal Corporations Act* of 1835 was to legalise the beneficial interests therein mentioned, without reference to the legality of their origin, and, in particular, to obviate any objection which might otherwise arise in respect of the tendency towards a perpetuity of any such beneficial interest.—An action to establish such rights as aforesaid may be brought by parties claiming to be entitled, without an information by the Attorney-General.—In such an action it was held on demurrer that in order to enable the Plaintiffs to avail themselves of such saving of rights as aforesaid, it was sufficient for them, after stating the title of the corporation by charter or otherwise to the property in question, to aver that at the time of the passing of the Act the rents, tolls, and profits claimed by them were not, nor ever had been, nor ought to have been, held and applied to public purposes, but then were, and always had been, held and applied for the particular benefit of the freemen, and without pleading that such rents, tolls, and profits had been enjoyed or acquired by virtue of any specific statute, charter, by-law or custom, or expressly to aver that any custom to such effect as aforesaid existed. PRESTNEY *v.* MAYOR AND CORPORATION OF COLCHESTER AND THE ATTORNEY-GENERAL - - - - - 111

MUSICAL COMPOSITION—Copyright - 232
See COPYRIGHT. 1.

NECESSARIES—Supplied to lunatic - 615
See LUNATIC. 2.

NEGLIGENCE—Mortgagee — Possession of title deeds—Priority - - - 124
See MORTGAGE. 3.

NEW STREET - - - - 621
See LOCAL GOVERNMENT ACTS. 2.

NOTICE—Act of bankruptcy—Adjudication 605
See BANKRUPTCY. 9.

—— Constructive and imputed - - 685
See VENDOR AND PURCHASER. 3.

NOVELTY—Patent - - - - 720
See PATENT.

OFFICIAL LIQUIDATOR—Costs—Appeal 381
See COMPANY. 10.

ORDER—Discharge of prisoner - - 230
See PRACTICE. 4.

——Indorsement on—Attachment - 360
See PRACTICE. 5.

ORDER AND DISPOSITION - - 871
See BILL OF SALE. 3.

PARLIAMENT—*Election Expenses—Payment of Canvassers by Sub-Agent*—26 & 27 *Vict. c.* 29, *s.* 2.] It is unlawful for any election agent or sub-agent, except the expense agent, to make payments on behalf of the candidate even for current disbursements, and such payments cannot be recovered from the candidate.—An election sub-agent, who was a solicitor, employed canvassers for the work of

PARLIAMENT—*continued.*
the election, and paid them out of his own moneys. The expense agent having disallowed these payments the sub-agent brought an action against the candidate in the district registry for the money expended. The candidate obtained the common order to tax the Plaintiff's account as a solicitor's bill of costs, and then obtained an order to stay further proceedings in the action pending the taxation. On the taxation the candidate objected to the payments as illegal under the 2nd section of the *Corrupt Practices Act*, 1863 (26 & 27 Vict. c. 29):—*Held* (affirming the decision of *Chitty*, J.), that the payments were illegal; that although the sub-agent had an implied authority to employ canvassers, he had no implied authority to pay them, and therefore he could not recover the amount expended from the candidate: *Held*, also, that the candidate could take the objection of illegality on the taxation of the bill of costs.—Whether the order to stay proceedings in the action pending the taxation was regular, *quære*. *In re* Parker - - - C. A. 408

PARTIES—Action against firm - - 484
See Practice. 8.

—— Adding Defendant - - - 718
See Practice. 19.

—— Liberty to attend—Costs - - 830
See Practice. 9.

PARTITION SUIT—*Disputed Title—Co-tenant in Common, Mortgagee of Entirety—Australian Bankruptcy—Real Estate in England—Will of Realty—Evidence.*] Where a tenant in common of a freehold messuage subject to a mortgage in fee, had procured the transfer of the mortgage to himself and was in possession thereunder, his co-tenant in common was held entitled in a partition action to a sale of the property subject to the mortgage.—Real estate in *England* does not vest in an assignee under a Victorian insolvency.—For the purposes of the usual preliminary judgment in a partition action letters testimonial of the Supreme Court of the colony of *Victoria*, Probate Jurisdiction, setting out the will verbatim, were accepted as sufficient proof of a will made in *Victoria* of real estate in *England*. Waite *v.* Bingley [674

PARTNERSHIP—Action against firm—Executors carrying on same business - 484
See Practice. 8.

—— Liquidation of one partner—Statement of debts and assets - - - 594
See Bankruptcy. 5.

PATENT—*Novelty—Anticipation—Prior publication—Book in Foreign Language—Validity—Variation between Provisional and Complete Specification—Insufficiency of Provisional Specification—Infringement—Use of Equivalent—Discovery after Date of Patent—Practice—Certificate of Proof of Breaches—Patent Law Amendment Act*, 1852 (15 & 16 *Vict. c.* 83), *ss.* 6, 43,] An instrument, which was alleged to be an anticipation of an invention, patented in 1876, for improvements in electric telephony and telephonic apparatus, was described in a paper written in German in a scientific journal, called the "*Zeitschrift*" of the *German-Austrian Telegraph Union*, which was published in *Berlin*, in 1862. The description was

PATENT—*continued.*
illustrated by figures. A copy of the "*Zeitschrift*" was in library of the Patent Office in *London*, and another copy was in the library of the Institute of Civil Engineers in *London*, where it was accessible to all the members, more than 3000 in number, and to friends introduced by them. It was, however, entered in the catalogue only under the head of "Journals," not under the head of "Telephones," or "Telegraphs." A telegraphic engineer gave evidence that, before the date of the patent, he had seen the description in the "*Zeitschrift*," and that, though he could not read German, yet, from his knowledge of the technical words used, he was able, with the assistance of the plates, to understand the substance of the invention:—*Held*, that there had been a sufficient publication in *England* of the prior invention before the date of the patent.—But *held*, upon the facts, that the prior invention was not an anticipation of the patented invention.—A patent held void on the ground that the nature of part of the invention described in and claimed by the complete specification, had not been sufficiently described in the provisional specification.—In a patent for "improvements in instruments for controlling by sound the transmission of electric currents, and the reproduction of corresponding sounds at a distance," the patentee claimed (1) "In an instrument for transmitting electric impulses by sound a diaphragm or tympan of mica, substantially as set forth; (2) In an instrument for transmitting electric impulses by sound, the combination with a diaphragm or tympan of electric tension regulators substantially as hereinbefore described for varying the resistance in a closed circuit substantially as set forth." The Plaintiffs, the owners of the patent, in the instruments which they manufactured and sold, used a diaphragm or tympan of mica to receive the air vibrations produced by the voice; below this diaphragm and in its centre, but of smaller size than it, was a cork, below the cork was a piece of platina foil of the same size as the cork, and in a cavity or box below the platina was placed the substance which was used as a tension regulator. The platina foil formed one electrode and the bottom of the box the other, the current of electricity passing from one to the other through the tension regulator. The Plaintiffs used for this purpose lampblack, artificially compressed into a button. The Defendants made and sold similar instruments, but they dispensed with the mica diaphragm and the cork, the air vibrations being in their instruments received directly on the platina foil, below which was placed the substance used as a tension regulator. The Defendants employed loose particles of coke for this purpose. At the date of the Plaintiffs' patent it was not known that the instrument would work without the independent mica diaphragm; this was a subsequent discovery. The Defendants adduced evidence to shew that their instrument would work equally well if the platina foil above the tension regulator was removed and the air vibrations were received directly on the particles of coke:—*Held*, that in the Defendants' instrument the platina foil acted as a diaphragm or tympan, and that the Defendants had infringed the Plaintiffs' patent.—When, at the trial of an action for the infringement of a

PATENT—*continued.*
patent, the Court is of opinion that there has been an infringement by the Defendant, but holds on a legal ground that the patent is void, it will not give the Plaintiff a certificate, under sect. 43 of the *Patent Law Amendment Act*, 1852, that breaches of the patent by the Defendant have been proved. UNITED TELEPHONE COMPANY *v.* HARRISON COX-WALKER, & Co. - - 720

PAYMENT INTO COURT—Action by remainderman - - - - - 121
See ADMINISTRATION ACTION. 3.

PAYMENT OUT OF COURT—Costs - 776
See PRACTICE. 6.

PENALTY — *Liquidated Damages — Breach of Contract to pay a Sum certain—Breach of several Stipulations of various importance—Forfeiture of Deposit—Lien for Money expended by Party who breaks the Contract.*] The Plaintiff entered into a contract with the Defendant, who was a builder, to sell him an estate for £70,000, which was to be expended by the Defendant in building on the estate. The contract contained numerous provisions, and amongst other things that a deposit of £5000 should be paid by the Defendant into the bankers to the joint account of the Plaintiff and Defendant, of which £500 was to be paid on the execution of the contract and the remainder within seven months. If the Plaintiff could not make a good title the deposit of the £500 was to be returned, and the Plaintiff was to pay the Defendant £5000 as liquidated damages. And if the Defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out the works, or in failing to perform any of the provisions of the contract, then and in either of such events the deposit of £5000 should be forfeited, and if it had not been paid the Defendant should forfeit and pay to the Plaintiff £5000 by way of liquidated damages, and the agreement should be void and of no effect, and the Plaintiff should regain possession of the estate; but credit was to be given to the Defendant for all moneys actually actually expended; and it was provided that such breach should not be the consequence of a misconstruction of the meaning of any of the provisions of the contract. —The Defendant did not pay the £500 deposit, and altogether failed in carrying out the contract, and the Plaintiff brought an action to recover £5000 as liquidated damages:—*Held* (affirming the decision of *Fry*, J.), that the condition of forfeiture was not intended to apply to the payment of the deposit of £500 which was to be paid on the execution of the contract, but to a substantial breach of any of the subsequent stipulations, and therefore the £5000 was not to be regarded as a penalty but as liquidated damages, the payment of which could be enforced against the Defendant. Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is that the sum named is not to be treated as a penalty, but as liquidated damages.—But whether it would not be treated as a penalty if one of the stipulations was of very trivial importance:—*Quære.*—Where there is a condition for the forfeiture of a

PENALTY—*continued.*
deposit for the breach of various stipulations, even though some of them may be very trivial, or for payment of a fixed sum of money, the forfeiture will be enforced and not treated as a penalty.—*Astley* v. *Weldon* (2 B. & P. 346); *Kemble* v. *Farren* (6 Bing. 141): *Atkyns* v. *Kinnier* (4 Ex. 776); *Magee* v. *Lavell* (Law Rep. 9 C. P. 107); *In re Newman* (4 Ch. D. 724); and *Betts* v. *Burch* (4 H. & N. 506), commented on.—*Per Fry*, J.: A man who enters into a contract to expend a certain sum of money on land, and after spending part of it declines to perform the contract, has no lien on the land for the money which he has expended. WALLIS *v.* SMITH - - - C. A. 243

PENDING LITIGATION - - - 278
See WILL. 4.

PENSION—Judge of colony—Bankruptcy - 85
See BANKRUPTCY. 8.

PERIOD OF VESTING—Portions - - 806
See WILL. 7.

PERMANENT IMPROVEMENTS—Mortgagee in possession - - - - 469
See MORTGAGE. 1.

PERSONAL ACTION—Dying with the person 484
See PRACTICE. 8.

—— Stay of proceedings—Concurrent actions 202
See PRACTICE. 20.

PETITION—Bankruptcy - - - 394
See BANKRUPTCY. 1.

—— Winding-up—Contributory - - 849
See COMPANY. 9.

—— Winding-up—Commencing business - 209
See COMPANY. 7.

PLEADING - - - - 138, 802
See PRACTICE. 10, 12.

—— Action by freemen of borough—Custom of borough - - - - 111
See MUNICIPAL CORPORATION.

PORTIONS—Appointment before required 332
See POWER.

—— Vesting - - - - - 806
See WILL. 7.

POWER—*Appointment of Portions before required —Fraud on Power.*] *B. P. W.* having a power of charging portions for younger children on real estate under a settlement which gave him in the clearest terms power to fix the ages and times at which the portions should vest, and contained no provision for raising portions in default of appointment, and having three daughters aged nine, seven, and one, appointed by deed in 1828 £10,000 (being the full amount he was entitled to charge) for the portions of the daughters, to be a vested interest in the three daughters respectively immediately on the execution of the deed, the portions to be paid to them at such times and in such proportions as he should by deed or will appoint, and in default of appointment to be paid to them share and share alike, at twenty-one or marriage, if the same age or time should happen after his decease, but if in his lifetime, then the payment to be postponed till after his death, unless he should signify his consent in writing to their being raised and paid in his lifetime maintain-

POWER—*continued.*

ance at £4 per cent. to be raised from his death, and the deed contained a power of revocation. In 1832 he made by deed a similar appointment by way of confirmation of the former, the portions to be vested immediately on the execution of the deed. One daughter married and attained twenty-one, and in 1851 *B. P. W.* appointed £5000, part of the £10,000, to her. The other two died infants and spinsters, one in 1836, the other in 1845. *B. P. W.* assigned to the Plaintiff for value in 1875 the £5000 appointed to the two deceased daughters, and after his death the Plaintiff brought this action to have it raised:—*Held* (reversing the decision of *Kay*, J., who had dismissed the action as against the owners of the settled estate), that where a donee of a power of charging portions on real estate has, under the terms of the power, clear authority to fix the times at which portions shall vest, and appoints a portion to vest immediately, there is no rule of law which prohibits its being raised in the event of the child dying under twenty-one and unmarried, and that the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was not within the power. *Lord Hinchinbroke* v. *Seymour* (1 Bro. C. C. 395), considered and examined.—*Held*, also, that the decision could not be supported on the ground that the appointment, so far as it made the portions vest immediately, was a fraud on the power as being made with a view to secure a benefit to the appointor; for that having regard to the fact that if the father had died without making any appointment, the children would have been unprovided for, it was manifestly for the benefit of the children that the father should make an appointment, and that as there was nothing to lead to the conclusion that when the appointments were made the children were likely to die young, and as in the event of the early death of the appointor the children might have derived a benefit from the absolute vesting of their portions, there was no ground for attributing to him an intention to benefit himself by making the portions vest immediately.—*Held*, therefore, that the Plaintiff was entitled to have the £5000 raised. Henty *v.* Wrey - - - - - **C. A. 332**

—— Discretion of trustees — Interference of Court - - - **571, 576, n**

See Will. 9, 10.

PRACTICE—*Admissions — Motion for Judgment — Specific Performance—Rules of Court*, 1875, *Order* XL., *r.* 11.] A plaintiff may move for judgment upon admissions in the pleadings at any stage in the trial, and notwithstanding that he has joined issue on the defence and given notice of trial. Brown *v.* Pearson - - **716**

2. —— *Appeal after Time—Appeal from Decree declaring Future Rights.*] A testator gave after the death of his wife, a legacy to his son *E. S.* for life and after his death to his children, and if he died without issue it was to be divided among the testator's "surviving children." Six other legacies were given in a similar way. All the seven children survived the testator. A suit for administration was instituted, to which all were parties. In 1836 an order on further consideration was made, at which time six of the children were

PRACTICE—*continued.*

living, and it was declared, that on the death of the widow, *E. S.* would become entitled to the interest on the legacy for life, that on his death it would be divisible among his children then living, but if he died without leaving issue, then among the children of the testator who were living at the testator's decease. The testator's widow died in 1838, and *E. S.* died in 1881 without ever having had a child. At this time one child only of the testator was living, and he applied for leave to appeal against the order of 1836, on the ground that it was irregular in making a prospective declaration as to future rights:—*Held*, that leave to appeal ought not to be granted, the fact that a declaration was made as to future rights being no sufficient reason for giving such leave in a case where all parties who could in any event be interested were before the Court and adult when the declaration was made.—*Brandon* v. *Brandon* (7 D. M. & G. 365) and *Walmsley* v. *Foxhall* (1 D. J. & S. 451) considered and distinguished.—Observations on the change of opinion in the Legislature and the Judges as to the period during which orders should be appealable. Curtis *v.* Sheffield - - - - **C. A. 1**

3. —— *Appeal—Summons heard in Chambers—Desire to appeal—Motion for Certificate of Judge.*] Where, on a summons heard in Chambers, an order has been made by the Judge and not adjourned into Court, and there is a desire to appeal against it, the proper course is not to move in Court, on notice, to discharge the order, or for a certificate that the Judge does not desire it to be reheard, but to make an application in Chambers.—*Holloway* v. *Cheston* (19 Ch. D. 516) not followed. *In re* Butler's Wharf Company. Anderson *v.* Butler's Wharf Company - **131**

4. —— *Attachment—Discharge of Prisoner in Custody for Contempt — Sheriff — Debtor's Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4.] No order is necessary for the discharge of a prisoner in custody for contempt under any of the exceptions contained in sect. 4 of the *Debtor's Act*, 1869, where the writ of attachment has appended to it a note in the following terms:—"Note.—This writ does not authorize an imprisonment for any longer period than one year." It is now the usual practice to append the above note to all writs of attachment issued under the above section. *In re* Edwards. Brooke *v.* Edwards **230**

5. —— *Attachment—Indorsement on Order—Cons. Ord. XXIII. r.* 10.] On the 20th of May, 1881, an order was made for the Defendants within seven days after service, to file an affidavit as to documents. The copy served had no such indorsement as is required by Cons Ord. XXIII. r. 10. The Defendants filed successively three affidavits, which were successively held insufficient, and on the 10th of February, 1882, filed a fourth. A summons was taken out to consider its sufficiency, and on its being attended on the 24th of February, the Defendant's solicitor stated that the draft of a further affidavit had been sent into the country, and that the affidavit would be filed as soon as possible, and requested an adjournment. The Chief Clerk refused to adjourn; held the affidavit of the 10th of February to be insufficient, and ordered the Defendants to pay the costs. On the

PRACTICE—*continued.*

25th the Plaintiffs served notice of motion for attachment for the 3rd of March. On the 28th of February the Defendants filed a further affidavit, and on the 1st of March asked the Plaintiffs' solicitors whether they proposed to withdraw their notice of motion. The Plaintiffs' solicitors replied that they did not, as their briefs had been delivered before the affidavit was filed, but that they would consider any proposal the Defendants had to make. The Defendants' solicitors wrote in answer making no offer to pay any costs, but saying that they should deliver their briefs. *North*, J., refused the motion with costs:—*Held*, on appeal, that the Plaintiffs were right in giving their notice of motion, and that as the Defendants had made no offer to pay any costs, the Plaintiffs were entitled to bring on their motion, and must have the costs of it. Under the practice established by the *Judicature Acts*, it is not necessary that the copy of an order which is served should have the indorsement required by Cons. Ord. XXIII., r. 10, stating the consequences of failing to obey the order. THOMAS *v.* PALIN - - C. A. 360

6. —— *Chancery Funds Rules*, 1874, *r.* 91—*Chancery Funds Amended Orders*, 1874, *r.* 14—*Costs—Railway Company—Payment out of Court—Fund exceeding £500 not dealt with for Fifteen Years—Costs of Official Solicitor.*] Where a fund in Court exceeding £500 in value and representing the purchase-moneys of settled lands taken by a railway company, with accumulated interest, had not been dealt with for upwards of fifteen years, and it had become necessary under the Chancery Funds Rules, 1874, r. 91, and the Chancery Funds Amended Orders, 1874, Order 14, to serve the official solicitor with the petition for the payment out of the fund:—*Held*, first, that his costs were not payable by the railway company; secondly, that such costs having been occasioned by the default of the tenant for life, were properly payable out of the portion of the fund which came to his estate. *In re* J. CLARKE'S ESTATE - - - - 776

7. —— *Conduct of Proceedings—Concurrent Suits—Action in Palatine Court.*] The general rule that where two actions have been commenced for the administration of the same estate the conduct of the proceedings will be given to the Plaintiff in the first action, although the decree in the second has been obtained first, applies to actions commenced in the Palatine Court of *Lancaster*, as well as to those commenced in the High Court of Justice. In considering whether the rule ought to be applied the Court will have regard to the special circumstances, and will take into account the amount of the interest of the Plaintiff in the first action, and his object in bringing his action. The fact of a plaintiff, being a stranger to the family, who had bought up the reversionary interests of some of the residuary legatees, *held* not a sufficient reason for not giving him the conduct of the proceedings, although his purchase of some of the shares was disputed on the ground of inadequacy of consideration and undue influence.—The decision of *Bacon*, V.C., reversed. *In re* SWIRE. MELLOR *v.* SWIRE - C. A. 647

8. —— *Continuance of Action against Executors—Actions for Damages and Injunction on a Tort by Testator—Actio personalis moritur cum personâ*

PRACTICE—*continued.*

—3 & 4 Will. 4, c. 42, s. 2—Death of sole Defendant trading under Name of Firm—Executors carrying on Trade under same Firm—Rules of Court, 1875, *Order XII., r. 12a.; Order L.*] The Plaintiff brought his action for damages and an injunction against the firm of *T. & Co.* for torts committed by the firm. The firm consisted of *T.* alone, who died more than six months after the commencement of action, and the action was continued against his executors:—*Held* (affirming the decision of *Hall*, V.C.), that *T.* having died more than six months after the commission of the acts complained of, no action either for damages or injunction could be maintained against his executors; although the action had been commenced in the lifetime of the testator, and although the executors continued the business in the name of the firm. KIBK *v.* TODD - - - - C. A. 484

9. —— *Costs—Parties having liberty to attend.*] Mere liberty to attend the proceedings under an administration judgment does not entitle the parties having the liberty to the costs of their attendance in Chambers as a matter of course. In order to entitle such parties to such costs the order giving the liberty to attend should expressly provide that they are to be entitled thereto. DAY *v.* BATTY - - - - 830

10. —— *Counter-claim—Claim for Recovery of Land—Joinder of other Cause of Action—Rules of Court*, 1875, *Order XVII. r.* 2; *Order XIX. r.* 3; *Order XXII. r.* 9—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3.] The provision of rule 2 of Order XVII., that no cause of action, except those specified in that rule, shall, unless by leave of the Court, be joined with an action for the recovery of land, applies to a counter-claim, as well as to an original action.—Order made to exclude a counter-claim, on the ground that in it such a joinder of causes of action had been made without the leave of the Court, and that the fair trial of the action would be embarrassed. COMPTON *v.* PRESTON - - - - 138

11. —— *Counter-claim — Revivor — Rules of Court*, 1875, *Order XIX., r.* 3; *Order L.*] On the death of a defendant who has delivered a counter-claim, it is necessary that his representatives, if they wish to prosecute the counter-claim against the plaintiff in the original action, should obtain an order of revivor against him.—An order of revivor of the original action obtained by the Plaintiff against them does not authorize them to prosecute the counter-claim against him. ANDREW *v.* AITKEN - - - - - 175

12. —— *Counter-claim—Rules of Court*, 1875, *Order XIX., r.* 3; *Order XXII., r.* 9; *Order XXVII., r.* 1.] Order XIX., r. 3, is sufficiently general to allow a counter-claim by way of defence whether or not it is connected with or of the same character as the plaintiff's claim, and whether it sounds in damages or not.—But the Court has a discretion to exclude a counter-claim which may unduly delay the action. GRAY *v.* WEBB - 802

13. —— *Evidence — Affidavit — Documents—Prolixity.*] An affidavit as to documents setting out a very large number of letters instead of referring to them in bundles properly identified,

PRACTICE—*continued.*

was ordered to be taken off the file, the costs to be paid by the Defendants. Walker *v.* Poole [835

14. —— *Evidence — Cross-Examination — Withdrawal of Affidavit*—15 & 16 *Vict. c.* 86, *s.* 40.] Where a person has made and filed an affidavit for the purpose of being used in a matter pending before the Court, he cannot be exempted from cross-examination by the withdrawal of the affidavit.—*Clarke* v. *Law* (2 K. & J. 28) approved and held to be applicable where the person making the affidavit is not a party to the proceedings. *In re* Quartz Hill, &c., Company. *Ex parte* Young - - - - C. A. 642

15. —— *Evidence — Professional Witness — Auctioneer—Expenses—Loss of Time.*] An auctioneer summoned to give evidence before a special examiner appointed under proceedings in the Chancery Division is, as a professional witness, entitled to be paid a guinea a day by way of compensation for his loss of time, together with the amount of his travelling expenses, if any, including therein his railway fare, first-class, from his residence to the place of his examination and back again. And, although sworn, he may refuse to answer any questions until a sum sufficient to cover these amounts has been paid him. *In re* Working Men's Mutual Society - 831

16. —— *Injunction — Illegal Act—Injury to Public—Right of Attorney-General to sue—Evidence of Injury—Company—Excess of Statutory Powers—Costs.*] When an illegal act is being committed, which in its nature tends to the injury of the public (such as an interference with a public highway or a navigable stream), the Attorney-General can maintain an action on behalf of the public to restrain the commission of the act, without adducing any evidence of actual injury to the public, and in such a case an injunction will be granted with costs, although no evidence of actual injury is given.—*Attorney-General* v. *Great Eastern Railway Company* (11 Ch. D. 449), *Attorney-General* v. *Cockermouth Local Board* (Law Rep. 18 Eq. 172), and *Attorney-General* v. *Ely, Haddenham, and Sutton Railway Company* (Law Rep. 4 Ch. 194) considered. Attorney-General *v.* Shrewsbury (Kingsland) Bridge Company - - - - 752

17. —— *Injunction — Protection of Property —Equitable Mortgage — Ex parte Injunction to restrain parting with Legal Estate.*] In an action by an equitable mortgagee for sale or foreclosure the Court granted an interim injunction to restrain dealing with the legal estate till the next motion day, on an *ex parte* application by the Plaintiff; there being ground for believing that the Defendants intended to part with the legal estate *pendente lite*. London and County Banking Company *v.* Lewis - - C. A. 490

18. —— *Interlocutory Injunction—Undertaking as to Damages.*] An injunction to restrain the Defendant from building so as to prevent access of light and air to the Plaintiff's windows was granted *ex parte* on the 4th of November, 1879, and on the 27th of November was continued until the trial or further order, the Plaintiff giving the usual undertaking as to damages. On

PRACTICE—*continued.*

the 18th of February, 1880, the Court of Appeal discharged the order. On the 11th of November, 1880, a perpetual injunction as to access of air was granted; but on the 21st of June, 1881, the Court of Appeal dismissed the action with costs. On the 16th of February, 1882, the Defendant gave notice of motion for an inquiry as to damages which was refused by *Bacon*, V.C. The only damage alleged was that the Defendant had agreed to let part of the property with the new buildings to a tenant, and was prevented from carrying this out by the injunction preventing his building. It was not proved, however, that there was any binding agreement to take a lease, nor did it appear that the injunction interfered with the erection of the buildings to such an extent as would have entitled the intended tenant to throw up the agreement if binding:—*Held*, by the Court of Appeal, that an inquiry as to damages ought not to be granted.—Whether where an interlocutory injunction has been wrongly granted, owing to a mistake of law by the Judge, without any misrepresentation, suppression, or other default on the part of the Plaintiff, an inquiry as to damages can be directed under the undertaking, *quære*. *Jessel*, M.R., and *Cotton*, L.J., differed, and *Brett*, L.J., gave no opinion.—The Court is not bound to grant an inquiry as to damages whenever the Defendant has sustained some damage by the granting the injunction; but it has a discretion, and may refuse any inquiry if the damage restrained is trivial or remote, or if there has been great delay in making the application.—The question considered at what time the application for an inquiry as to damages ought to be made:—*Held*, that, even if there had been a binding agreement by the proposed tenant to take a lease, and the injunction had so interfered with the building as to entitle the tenant to be off the bargain, damages ought not to be granted in respect of it, for that damages must be confined to the immediate natural consequences of the injunction, under the circumstances which were within the knowledge of the party obtaining the injunction. Smith *v.* Day - - C. A. 421

19. —— *Parties — Rules of Court*, 1875, *Order* xvi., *r.* 9.] The Plaintiff, a bondholder of a railway company, sued "on behalf of himself and all the bondholders of the company other than the Defendant *B.*," but did not obtain an order under Order xvi., rule 9, that *B.* should be sued as representing all bondholders who dissented from the Plaintiff's claim.—One of the bondholders took out a summons whereby he stated that neither the Plaintiff nor the Defendant *B.* properly represented the interests of himself and certain other bondholders, and applied to be made a defendant:—*Held*, that the applicant was entitled to be made a defendant, to represent the bondholders being dissentient from the Plaintiff's view. Fraser *v.* Cooper, Hall, & Co. - 718

20. —— *Stay of Proceedings—Two Actions in this Country—Lis alibi pendens—Actions in rem —Actions in personam.*] Where the actions are *in personam* it is no ground for staying proceedings in an action in this country that there is another action pending in this country, and also an action in a foreign country, the former partly

PRACTICE—*continued.*
and the latter wholly relating to the same subject matter.—*Cox* v. *Mitchell* (7 C. B. (N.S.) 55; 29 L. J. (C.P.) 33) followed.—*The Mali Ivo* (Law Rep. 2 A. & E. 356), *The Catterina Chiazzare* (1 P. D. 368), and *The Delta* (1 P. D. 393) considered and distinguished. McHENRY *v.* LEWIS - - - - - - 202

21. —— *Third Party — Questions between Defendant and Third Party—Costs to be paid by Third Party—Rules of Court*, 1875, *Order* XVI., *rr.* 17, 18, 19, 20, 21.] No questions can be determined between a Defendant and a third party brought into the action by the Defendant unless an order be obtained under Order XVI., rule 17, giving directions that such questions shall be determined.—The Court has power under Order XVI., rule 21, to order the third party so brought into the action to pay to the Plaintiff the costs occasioned by his defence. PILLER *v.* ROBERTS 198

22. —— *Trial—Jury—Rules of Court*, 1875, *Order* XXXVI., *rr.* 3, 26.] The hearing of a motion for an injunction was (with the consent of the Defendants), ordered to stand to the hearing, with liberty to either party to apply to expedite the trial:—*Held*, that the Defendants by consenting to such order were not deprived of their option to have the issues of fact tried by a jury, although the effect might be to prevent the Plaintiffs from having the trial expedited. CLARKE *v.* SKIPPER [134

23. —— *Varying Minutes — Production of Registrar's Note.*] On the hearing of a motion to vary the minutes of an order the solicitor of the moving party ought to produce a copy of the Registrar's note of what took place when the order was made. ROBINSON *v.* LOCAL BOARD FOR BARTON - - - - - - 621

—— Administration action.
See Cases under ADMINISTRATION ACTION.

—— Appeal by liquidator - - - 381
See COMPANY. 10.

—— Bankruptcy - - - - 439
See BANKRUPTCY. 12.

—— Lunacy - - - - - - 613
See LUNATIC. 3.

—— Pending litigation - - - 278
See WILL. 4.

—— Settled Estates Act - - 41, 123
See SETTLED ESTATES ACT. 1, 2.

—— Trustee Act - - - 778, 846
See TRUSTEE ACTS. 1, 2.

—— Trustee Relief Act - - - 855
See TRUSTEE RELIEF ACT.

PRIOR PUBLICATION—Patent - - 720
See PATENT.

PRIORITY—Administration of assets—Unregistered judgment - - - 189
See ADMINISTRATION ACTION. 4.

—— Contemporaneous deeds - - 762
See DEED.

—— Mortgage—Negligence - - 124
See MORTGAGE. 3.

—— Shares — Trustees — Lien of company on shares - - - - 302
See COMPANY. 6.

PRIVILEGE—Libel—Friendly society - 798
See LIBEL.

PROBATE—Revocation of - - - 581
See ADMINISTRATION ACTION. 6.

—— Will of real estate in *Victoria* - 674
See PARTITION SUIT.

PROFESSIONAL WITNESS—Expenses - 831
See PRACTICE. 15.

PROOF—Bankruptcy - - 537, 780
See BANKRUPTCY. 6, 7.

—— Breaches of patent - - - 720
See PATENT.

PROPERTY OF BANKRUPT—Salary - 85
See BANKRUPTCY. 8.

PROTECTED TRANSACTION - - 605
See BANKRUPTCY. 9.

PROTECTION OF PROPERTY - - 490
See PRACTICE. 17.

PROVISIONAL SPECIFICATION—Patent 720
See PATENT.

PUBLICATION—Drama—Copyright - 232
See COPYRIGHT. 1.

PURCHASE-MONEY—Lands Clauses Act 228
See LANDS CLAUSES ACT. 2.

—— Vendor's lien for - - - 685
See VENDOR AND PURCHASER. 3.

PURCHASER WITHOUT NOTICE - - 685
See VENDOR AND PURCHASER. 3.

RAILWAY COMPANY—*Borrowing Powers—Sale and Hiring of Rolling Stock—Ultrà vires act*—30 & 31 *Vict. c.* 127, *s.* 4—*Rights of Debenture Holders.*] A *Railway Company* being in want of money, and being advised that they had no power to borrow, sold part of their rolling-stock to a *Wagon Company* for £30,000, at the same time making a contract with the *Wagon Company* for the hire of the same rolling-stock at a rent which would repay the £30,000 with interest in five years, and then for its re-purchase at a nominal price. At the same time three of the directors guaranteed to the *Wagon Company* the payment of the rent.—The *Wagon Company* brought an action against the *Railway Company* and the sureties for non-payment of rent due.—*Kay*, J., having held that the transaction was void as against the *Railway Company*, but could be enforced against the sureties:—*Held*, by the Court of Appeal, that the transaction was not a borrowing of money, but a *bonâ fide* sale and hiring of the rolling-stock, and was valid both against the *Railway Company* and the sureties.—Observations on the rights of debenture holders over the rolling stock of a railway company. YORKSHIRE RAILWAY WAGON CO. *v.* MACLURE - - - - C. A. 309

—— Compulsory powers—Compensation - 143
See LANDS CLAUSES ACT. 1.

REAL ESTATE—Infant—Power of Court to mortgage - - - - 786
See INFANT. 2.

RECOVERY OF LAND—Joinder of causes of action—Counter-claim - - 138
See PRACTICE. 10.

REDEMPTION—Order for sale - - 169
See MORTGAGE. 2.

REGISTER COUNTY—*Yorkshire* - - 685
See Vendor and Purchaser. 3.
REGISTRAR—Note of—Varying minutes 621
See Practice. 23.
REGISTRATION—Bill of sale - 73, 543, 871
See Bill of Sale. 1, 2, 3.
—— Building for religious worship - 513
See Charity. 1.
—— Judgment - - - - - 189
See Administration Action. 4.
—— Trade-mark - - - - 47, 223
See Trade-mark. 1, 2.
RELATIONS—Allowance to - - 297
See Lunatic. 1.
RELIGIOUS EDUCATION—Wishes of father 817
See Infant. 1.
RELIGIOUS WORSHIP—Registration of building
See Charity. 1. [513
RELINQUISHMENT OF DEBT—Condition 431
See Will. 1.
RENT—Distress after bankruptcy - - 442
See Bankruptcy. 3.
—— Payable in advance—Distress - 9
See Landlord and Tenant. 1.
—— Winding-up of company - - 322
See Company. 8.
REPAIRS—Infant's estate - - - 786
See Infant. 2.
—— Investment of purchase-money — Lands Clauses Act - - - 228
See Lands Clauses Act. 2.
—— Landlord and tenant - - - 18
See Landlord and Tenant. 2.
REPUGNANCY—Conditional limitation - 838
See Will. 5.
RESERVATION OF MINERALS - - 18
See Landlord and Tenant. 2.
RESOLUTION OF CREDITORS—Bankruptcy—Direction as to administration - 397
See Bankruptcy. 11.
RESTRICTIVE COVENANT—Conveyance settled by Judge - - - - 466
See Vendor and Purchaser. 2.
—— Objection to title - - - 95
See Vendor and Purchaser. 1.
REVIVOR—Counter-claim - - - 175
See Practice. 11.
ROLLING STOCK—Sale and hire of—*Ultrà vires*
See Railway Company. [309
RULES OF COURT, 1875, Order XII., r. 12a 484
See Practice. 8.
—— **Order XVI., r. 9** - - - 718
See Practice. 19.
—— —— **r. 13** - - - - 278
See Will. 4.
—— —— **rr. 17, 18, 19, 20, 21** - - 198
See Practice. 21.
—— **Order XVII., r. 2** - - - 138
See Practice. 10.
—— **Order XIX., r. 3** - - 138, 175, 802
See Practice. 10, 11, 12.
—— **Order XXII., r. 9** - - - 138, 802
See Practice. 10, 12.
RULES OF COURT, 1875—*continued.*
—— **Order XXVII., r. 1** - - - 802
See Practice. 12.
—— **Order XXXIII.** - - - 757
See Administration Action. 1.
—— **Order XXXVI., rr. 3, 26** - - 134
See Practice. 22.
—— **Order XL., r. 11** - - - 716
See Practice. 1.
—— **Order L.** - - - - 175, 484
See Practice. 8, 11.
—— **(Costs) Sched. r. 17** - - - 855
See Trustee Relief Act.

SALARY—Judge of colony—Bankruptcy - 85
See Bankruptcy. 8.
SALE—By Court - - - - 466
See Vendor and Purchaser. 2.
—— By mortgagee - - - - 857
See Mortgage. 4.
—— Order for—Redemption action - 169
See Mortgage. 2.
—— Settled Estates Act - - 41, 123
See Settled Estates Act. 1, 2.
SEPARATE ESTATE—Evidence - - 657
See Will. 13.
SEPARATE USE—Gift to - - - 743
See Will. 12.
SET-OFF—Misappropriation of money by directors - - - - - 519
See Company. 3.

SETTLED ESTATES ACT—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70, —*Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18)—*Irregular Order—Protection of Purchaser under Order.*] An order for sale under the *Settled Estates Act*, 1877, contained a direction dispensing with the concurrence or consent of the persons entitled, whether beneficially or otherwise, to any estate or interest subsequent to a certain estate tail, without naming them. The purchaser objected to the title on the ground that the order on the face of it was irregular:—*Held*, by *Hall*, V.C., that under the special circumstances of the case it was unnecessary for the parties whose concurrence was dispensed with to be named in the order:—*Held*, by the Court of Appeal, that under the 70th section of the *Conveyancing and Law of Property Act*, 1881, the purchaser would in any event have a good title—that section being applicable whether the objection to the order appears on the face of it or not, and that the purchaser must complete. *In re* Hall Dare's Contract - - - C. A. 41

2. —— 1877 (40 & 41 *Vict. c.* 18), *s.* 16—*Sale out of Court.*] The Court has no jurisdiction to direct a sale under the *Settled Estates Act*, 1877, to be conducted out of Court.—*In re Adams' Settled Estates* (9 Ch. D. 116) not followed. *In re* Harvey's Settled Estate - - 123

SETTLEMENT—Discretion of trustees—Interference of Court - - 571, 576, n.
See Will. 10.

SHERIFF—*Fi. Fa.—Wrongful Seizure—Injunction—Costs.*] Under a writ of *fi. fa.* against a son, the sheriff seized goods of his father, in

SHERIFF—*continued.*

whose house the son lived. The son had in fact no goods there, except some wearing apparel. The writ was indorsed with a statement that the son lived at a certain address, which was in fact the father's house, though the indorsement did not state this. The father gave verbal notice to the bailiff that he claimed the goods, and the next day the sheriff issued an interpleader summons. Meanwhile the father had commenced an action against the sheriff alone, claiming an injunction to restrain him from remaining in possession, and *Hall*, V.C., without requiring notice to be given to the execution creditor, granted the injunction. The sheriff appealed, and meanwhile the execution creditor, on the hearing of the interpleader summons, had admitted that the goods seized were the father's. No misconduct on the part of the sheriff was proved:—*Held*, that the action was premature; that the father ought to have waited to see the result of the interpleader proceedings; and that he must bear his own costs of the motion for the injunction in both Courts:—*Held*, also, that the Vice-Chancellor ought not to have granted the injunction without hearing the execution creditor, who should have been made a party to the action, or at any rate served with notice of it. HILLIARD *v.* HANSON - - C. A. 69

SOLICITOR—Explanation by - - 543
See BILL OF SALE. 1.

SPECIFICATION—Patent - - - 720
See PATENT.

STATEMENT OF DEBTS AND ASSETS—Liquidation—Partners - - - 594
See BANKRUPTCY. 5.

STATUTES:

13 Eliz. c. 5—*Fraudulent Conveyances* - 553
See BANKRUPTCY. 4.

29 Car. 2, c. 3, s. 1—*Frauds* - - 442
See BANKRUPTCY. 3.

2 & 3 Anne, c. 4—*West Riding Registry* 685
See VENDOR AND PURCHASER. 3.

3 & 4 Will. 4, c. 15, s. 1—*Copyright* - 232
See COPYRIGHT. 1.

3 & 4 Will. 4, c. 42, s. 2—*Amendment of Law*
See PRACTICE. 8. [484

4 & 5 Wm. & M. c. 20, s. 3—*Judgments* - 189
See ADMINISTRATION ACTION. 4.

5 & 6 Will. 4, c. 76, s. 2—*Municipal Corporations* - - - - - 111
See MUNICIPAL CORPORATION.

1 Vict. c. 26, s. 3—*Wills* - - - 667
See WILL. 3.

5 & 6 Vict. c. 45, ss. 2, 20, 22 - - 232
See COPYRIGHT. 1.

—— —— s. 13—*Copyright* - - 369
See COPYRIGHT. 2.

8 Vict. c. 18, s. 69—*Lands Clauses* - 228
See LANDS CLAUSES ACT. 2.

—— —— s. 85 - - - - 143
See LANDS CLAUSES ACT. 1.

—— —— ss. 127, 128 - - - 95
See VENDOR AND PURCHASER. 1.

10 & 11 Vict. c. 96—*Trustee Relief* - 855
See TRUSTEE RELIEF ACT.

STATUTES—*continued.*

11 & 12 Vict. c. 63, s. 2—*Public Health* 621
See LOCAL GOVERNMENT. 2.

13 & 14 Vict. c. 60—*Trustees* - - 778
See TRUSTEE ACTS. 1.

—— —— ss. 2, 23 - - - - - 846
See TRUSTEE ACTS. 2.

15 & 16 Vict. c. 83, ss. 6, 43—*Patent Law Amendment* - - - - 720
See PATENT.

15 & 16 Vict. c. 86, s. 40—*Chancery Improvement* - - - - 642
See PRACTICE. 14.

16 & 17 Vict. c. 51, s. 10—*Succession Duty* 100
See SUCCESSION DUTY.

16 & 17 Vict. c. 137, ss. 17, 62—*Charitable Trusts*
See CHARITY. 1, 2. [513, 514, n.

17 & 18 Vict. c. 36, s. 1—*Bills of Sale* - 510
See COMPANY. 11.

17 & 18 Vict. c. 113—*Locke King's Act* 583
See COMPANY. 5.

18 & 19 Vict. c. 81, s. 9—*Religious Worship*
See CHARITY. 1. [513

20 & 21 Vict. c. 85—*Divorce* - - 164
See DOWER.

21 & 22 Vict. c. 98, s. 34—*Local Government* 621
See LOCAL GOVERNMENT ACTS. 2.

23 & 24 Vict. c. 38, s. 3—*Law of Property* 189
See ADMINISTRATION ACTION. 4.

25 & 26 Vict. c. 89, s. 79—*Companies* - 209
See COMPANY. 7.

—— —— s. 91 - - - - 769
See COMPANY. 12.

—— —— ss. 101, 165 - - - 492
See COMPANY. 4.

—— —— s. 163 - - - - 510
See COMPANY. 11.

—— —— s. 165 - - - - 149
See COMPANY. 2.

26 & 27 Vict. c. 29, s. 2—*Corrupt Practices* 408
See PARLIAMENT.

30 & 31 Vict. c. 127, s. 4—*Railways* - 309
See RAILWAY COMPANY.

30 & 31 Vict. c. 131, s. 40—*Companies* - 849
See COMPANY. 9.

32 & 33 Vict. c. 62, s. 4—*Debtors* - 230
See PRACTICE. 4.

32 & 33 Vict. c. 71, ss. 4, 15, 17, 88, 89, 90—*Bankruptcy* - - - - 85
See BANKRUPTCY. 8.

—— —— ss. 6, 8 - - - - 394
See BANKRUPTCY. 1.

—— —— ss. 11, 15, 94, 95, 115 - - 849
See COMPANY. 9.

—— —— ss. 14, 20 - - - 397
See BANKRUPTCY. 11.

—— —— s. 15, sub-s. 5 - - - 871
See BILL OF SALE. 3.

—— —— s. 19 - - - - 61
See BANKRUPTCY. 10.

—— —— s. 22 - - - - 868
See BANKRUPTCY. 2.

STATUTES—*continued.*
32 & 33 Vict. c. 71, s. 49 - - - - 865
See Administration Action. 2.
—— —— s. 72 - - - - - 553
See Bankruptcy. 4.
—— —— s. 94, sub-s. 3 - - - - 605
See Bankruptcy. 9.
—— —— ss. 96, 97 - - - 439, 601
See Bankruptcy. 12, 13.
—— —— ss. 125, 126 - - - - 594
See Bankruptcy. 5.
33 & 34 Vict. c. 61, s. 3—*Life Insurance* 837
See Insurance Company.
33 & 34 Vict. c. 71, s. 22—*National Debt* 176
See Local Government Acts. 1.
34 & 35 Vict. c. 31, ss. 2, 3, 4—*Trade Unions*
See Trade Union. [194
36 & 37 Vict. c. 66, s. 22—*Judicature* - 278
See Will. 4.
—— —— s. 24, sub-s. 3 - - - - 138
See Practice. 10.
38 & 38 Vict. c. 55, ss. 4, 156, 157—*Public Health* - - - - 621
See Local Government Acts. 2.
—— —— s. 310 - - - - - 176
See Local Government Acts. 1.
38 & 39 Vict. c. 60, s. 23—*Friendly Societies*
See Libel. [798
38 & 39 Vict. c. 91, ss. 3, 5, 10—*Trade-marks*
See Trade-mark. 1. [47
—— —— s. 6 - - - - - 223
See Trade-mark. 2.
40 & 41 Vict. c. 18—*Settled Estates* 41, 123
See Settled Estates Act. 1, 2.
41 & 42 Vict. c. 31, ss. 8, 10—*Bills of Sale*
See Bill of Sale. 1, 2. [73, 543
—— —— ss. 8, 10 (sub-s. 2), 20 - - 871
See Bill of Sale. 3.
44 & 45 Vict. c. 41, s. 25—*Conveyancing and Law of Property* - - - 169
See Mortgage. 2.
—— —— s. 70 - - - - - 41
See Settled Estates Act. 1.
STATUTORY POWERS—Excess of - 752
See Practice. 16.
STAY OF PROCEEDINGS—Two actions on same subject-matter - - - 202
See Practice. 20.
STREET—Paving of - - - - 621
See Local Government Acts. 2.
SUB-PURCHASER—Vendor's lien for unpaid purchase-money - - - 685
See Vendor and Purchaser. 3.
SUCCESSION DUTY—*Proceeds of Real Estate in Court — Petition by Natural Children of an Englishman domiciled in Rome—Status—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 10 [*Revised Ed. Statutes, vol. xi., p.* 597].] *J. A.*, a native of *Cumberland*, went about forty years before his death in 1877 to reside in *Rome*, and there acquired a Roman or Italian domicil. He cohabited with an Italian woman, by whom he had four children, sons, all born in *Rome* prior to 1862. The parents were never married. *J. A.* inherited real estate in *England*. By his will, made in English form, he gave all his real estate whether in *Italy* or *England* to his four children, *nominatim*. The will was not valid in regard to his personal estate in *Rome*, but as he had acknowledged his natural children in his lifetime they were allowed to succeed to that estate as *heredes ab intestato*. The real estate in *England* was sold and the proceeds paid into Court:—On petition by the children for distribution of the fund, *held*, that their *status* was that of strangers in blood to the testator, and that the Crown was entitled to be paid 10 per cent. duty under the *Succession Duty Act*, 1853. Atkinson *v.* Anderson - 100
SUCCESSIVE MORTGAGES — Priority — Negligence - - - - - 124
See Mortgage 3.
SUPERFLUOUS LANDS - - - 95
See Vendor and Purchaser. 1.
SUPPORT—*Implied Grant—Right to Support.*] The corporation of *L.* put up a piece of land for sale in lots, the interest acquired by each purchaser being a right to a lease of the lot purchased by him, and he being bound to build upon the lot according to plans to be approved by the corporation. None of the lots were sold, and in July, 1868, the Plaintiff agreed for the purchase of one of the lots by private contract, subject to the original conditions. He furnished plans shewing a foundation 10 feet 9 inches deep; but finding the subsoil unsafe he laid his foundation at a depth of 8 feet 3 inches to the knowledge of the corporation whose officer inspected the operations and made no objections. In June, 1869, the Plaintiff's house was carried to the joists of the ground floor. In August, 1869, the Defendant purchased from the corporation the adjoining lot. In October, 1869, when the Plaintiff's house was nearly finished the corporation granted him his lease. After this the Defendant got his lease, and in 1881, wishing to carry his foundations lower than those of the Plaintiff, excavated to a considerably greater depth and endangered the foundations of the Plaintiff's house:—*Held* (affirming the decision of the Vice-Chancellor of *Lancaster*) that the Plaintiff was entitled to restrain the Defendant from excavating so as to let down the Plaintiff's house, for that there was not enough in the special circumstances of the case to take away the right of support from the adjoining lands of the grantor which is implied in a grant of land for the purpose of building.—How the case would have stood if the grants to the Plaintiff and the Defendant had been contemporaneous, or if the right of support claimed would have prevented the corporation from building in a reasonable way on the adjoining lot, *quære*. Rigby *v.* Bennett [C. A. 559
TENANCY AT WILL—Attornment clause in mortgage - - - - 442
See Bankruptcy. 3.
TENANT IN COMMON—Partition suit - 674
See Partition Suit.
—— "Share and share alike" - - 811
See Will. 8.
TENDER OF COSTS—Trustee - - 855
See Trustee Relief Act.

THIRD PARTY—Claim against - - 198
See PRACTICE. 21.

TITLE—Objection to—Restrictive covenant 95
See VENDOR AND PURCHASER. 1.

TITLE DEEDS—Possession of—Priority - 124
See MORTGAGE. 3.

TRADE-MARK — *Cancelling of Registration — Lapse of Five Years—Registration of Mark not authorized to be registered—Trade-marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *ss.* 3, 5, 10.] *P.* registered "braided fixed star" as a trade-mark for matches. After the expiration of five years another manufacturer applied to cancel the registration on the ground that the words could not be registered as a trade-mark, for that "fixed stars" was a name well known in the trade for a particular description of matches before *P.* used the alleged trade-mark, and that the words "braided fixed stars" were only a proper description of a kind of matches made by *P.* under a patent which had recently expired, and which matches were at the time of the registration well known in the trade by that name, and differed from the "fixed stars" formerly known by having a braided stem which was the subject of the patent:—*Held*, by *Chitty*, J., that even if the 3rd section of the *Trade Marks Registration Act*, 1875, did not make the lapse of five years conclusive evidence that the alleged trade-mark was a proper trade-mark, which, *semble*, it did, it at all events excluded evidence to shew that words which *primâ facie* appeared to be fancy words and proper to constitute a trade-mark were not capable of constituting one. His Lordship therefore declined to hear evidence on the subject, and refused the application.—*Held*, on appeal, that a mark which is not authorized to be registered as a trade-mark does not acquire the character of a trade-mark by being on the register for five years, and may be removed from the register though that period has elapsed; and that evidence ought, therefore, to have been admitted which went to shew that at the time of the registration the words "braided fixed stars" were merely descriptive of a kind of matches well known in the trade.—Whether a person sued for using a name which has been five years on the register as a trade-mark can defend himself on the ground that it is not a trade-mark, *quære*. *In re* J. B. PALMER'S APPLICATION [C. A. 47

2. —— *Trade-marks Registration Act*, 1875 (38 & 38 *Vict. c.* 91), *s.* 6—*Trade-mark Rules*, 1876, *rr.* 17, 19—*Old Mark registered for part of a Class —Registration of New Mark for other Goods in same Class—Limited Registration.*] A new mark may be registered for some of the goods in a class, even though an old mark of a similar kind has been already registered for other goods in the same class, provided that the goods and the trades of the proprietors are sufficiently distinct for no confusion to take place. *In re* F. BRABY & CO.'S APPLICATION. *In re* SHROPSHIRE IRON COMPANY'S TRADE-MARKS - - - - - 223

TRADE-MARK RULES, 1876, rr. 17, 19 - 223
See TRADE-MARK. 2.

TRADE UNION—*Contract—Direct Enforcement—Trade Unions Act*, 1871 (34 & 35 *Vict. c.* 31), *ss.* 2, 3, 4.] By the *Trade Unions Act*, 1871, s. 4, it is provided that nothing in the Act shall enable the Court to entertain any legal proceeding instituted with the object of directly enforcing an agreement for the application of the funds of a trade union to provide benefits to its members.—The Plaintiffs, members of a trade union within the Act, sought for an injunction to restrain other members from applying the funds in a manner contrary to an agreement to provide benefits to members:—*Held*, that such an injunction would not be a direct enforcement of the alleged agreement and that the Court might entertain the proceeding. WOLFE *v.* MATTHEWS - - 194

TRADER - - - - - 394
See BANKRUPTCY. 1.

TRIAL BY JURY - - - - 134
See PRACTICE. 22.

TRUSTEE—Appointment of—Trustee Act 778, [846
See TRUSTEE ACTS. 1, 2.

—— Costs—Bankruptcy during suit 862, 865
See ADMINISTRATION ACTION. 2, 5.

—— Costs—Trustee Relief Act - - 855
See TRUSTEE RELIEF ACT.

—— Discretion of—Interference of Court 571, [576, n.
See WILL. 3.

—— Estate of - - - - 790
See WILL. 2.

—— Permanent repairs—Expense of - 228
See LANDS CLAUSES ACT. 2.

—— Refusal to transfer—Trustee Act—"Sole" trustee - - - - 846
See TRUSTEE ACTS. 2.

—— Shareholders—Lien of company on shares
See COMPANY. 6. [302

TRUSTEE IN BANKRUPTCY—Direction as to administration - - - 397
See BANKRUPTCY. 11.

—— Vesting of property—Pension of retired Judge - - - - 85
See BANKRUPTCY. 8.

TRUSTEE ACTS — *Interpretation Clause — No Trustee appointed by Will—Appointment of Trustee to perform Duties incident to Office of Executor.*] Where a testator had, by his will, left all his property to his wife for life, and appointed her his sole executrix, and had also left legacies of considerable amount to be paid after her death, but had not constituted any persons trustees thereof:—*Held*, upon petition intituled in an administration action commenced for the purpose and in the *Trustee Act*, 1850, that upon the retirement of the widow the Court had jurisdiction under the *Trustee Act*, 1850, to appoint in her place a trustee or trustees to perform the duties incident to the office of an executor. *In re* MOORE. MCALPINE *v.* MOORE - - - - 778

2. —— *Trustees of Stock refusing to transfer—Vesting Order—"Sole" Trustee—Trustee Act*, 1850, *ss.* 2, 23,] Having regard to the interpretation clause (sect. 2) of the *Trustee Act*, 1850, the expression "sole trustee" in the Act includes all trustees who are jointly entitled. Consequently, where two trustees of stock refused to transfer it to two new trustees duly appointed under a power:—*Held*, that the Court had jurisdiction under the

TRUSTEE ACTS—*continued.*
23rd section to make an order vesting the stock in the new trustees. *In re* Hyatt's Trusts - **846**

TRUSTEE RELIEF ACT (10 & 11 *Vict. c.* 96) —*Practice—Petition—Trustee—Tender of* 42*s.*—*Costs of Appearance — Rules of Court*, 1875 (*Costs*), *Sched. r.* 17.] Trustees who are Respondents to a petition under the *Trustee Relief Act* for payment of a fund out of Court, and have been tendered and have accepted 42*s.* for their costs under Rules of Court, 1875 (Costs) Sched. r. 17, are not, as a general rule, entitled to their costs of appearance on the petition. *In re* Sutton - - - - - - - **855**

ULTRÀ VIRES ACT—Public injury - **752**
See Practice. 16.

—— Sale and hire of rolling stock - **309**
See Railway Company.

UNDERTAKING AS TO DAMAGES - **421**
See Practice. 18.

USE AND OCCUPATION—Mortgagee in possession - - - - - **469**
See Mortgage. 1.

VARIATION—Complete and provisional specifications - - - - **720**
See Patent.

VARYING MINUTES—Motion for - **621**
See Practice. 23.

VENDOR AND PURCHASER—*Restrictive Covenant—Railway Company—Superfluous Lands—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 127, 128.] Upon delivery of the abstract by a vendor who had contracted to deduce a good title in fee simple, it appeared that one of his predecessors had covenanted in his purchase deed not to use the property (which was a semi-detached villa standing on an eighth of an acre in a residential neighbourhood) or any part of it for the purpose of gasworks or a public-house:—*Held*, that this was such a restriction upon the user and enjoyment of the property as to constitute a fatal objection to the title.—A railway company selling its superfluous land is at liberty to impose such restrictive conditions upon the user and enjoyment of the land as may most conduce to their advantage as vendors, and there is nothing in the *Lands Clauses Consolidation Act*, 1845, to deprive them in this respect of the rights of ordinary vendors. *In re* Higgins and Hitchman's Contract - - - - - - **95**

2. —— *Sale by Court—Restrictive Covenant—Qualifying Proviso—Appeal from Form settled by Judge.*] In a sale by the Court the particulars of sale contained certain reservations and stipulations as to the property, and one of the conditions of sale provided that the conveyances should contain covenants by the purchasers for securing the liabilities and rights under such reservations and stipulations, the form of such covenants, in case of dispute, to be settled by the Judge.—A dispute having arisen between a purchaser and the vendor concerning the form of the covenant, the Judge settled the covenant, adding a proviso that if the purchaser assigned his purchase, and the assignee entered into a similar covenant, the purchaser

VENDOR AND PURCHASER—*continued.*
should be freed from further liability:—*Held*, that the vendor was entitled to an unqualified covenant, and that the proviso must be struck out.—The order of a judge settling the form of a conveyance is subject to appeal. Pollock *v.* Rabbits **[C. A. 466.**

3. —— *Vendor's Lien for Unpaid Purchase-money—Sub-Purchaser—Land in Register County—West Riding Registry Act* (2 & 3 *Anne, c.* 4)—*Release of Lien on Part of Land—Constructive Notice—Imputed Notice—Notice through Solicitor or Agent—Purchaser for Value without Notice—Evidence—Onus Probandi.*] A vendor of land situate in a register county, part of whose purchase-money remains unpaid, is under no obligation to obtain for the unpaid amount any written security which can be registered, but is entitled to rely simply on his equitable lien, which he can enforce against sub-purchasers who have notice of it, actual or constructive.—And such a vendor will not, by registering the conveyance to his purchaser, if he retains the deed in his possession, lose his lien as against sub-purchasers from the original purchaser.—Land, belonging to the trustees of a charity, situate in the suburbs of *Leeds*, in the West Riding of *Yorkshire*, was sold by the trustees, with the sanction of the Charity Commissioners, to some estate agents, who occupied a good position in *Leeds*. They bought the land with the intention of reselling it in small lots for building purposes. A receipt for the whole purchase-money, signed by the vendors, was indorsed on the conveyance, but only part of it was in fact paid. The vendors retained the deed in their possession, but, at the request of the purchasers, the vendor's solicitors registered a memorandum of it in the West Riding Registry. The vendors took no written security for their unpaid purchase-money, but relied only on their equitable lien. The purchasers sold the land again in lots, some of which were very small. None of the sub-purchasers had actual notice of the lien of the original vendors:—*Held*, that the original vendors were entitled to enforce their lien against such of the sub-purchasers as had constructive notice of it.—One of the sub-purchasers, who bought a small lot for £42, allowed the purchasers at their suggestion to employ their own solicitor to prepare the conveyance to him. He did not in any other way employ a solicitor in the matter, and he made no inquiries about the title or the deeds, nor did he search the register:—*Held*, that, under these circumstances, it was not the duty of the solicitor to communicate the existence of the lien to the sub-purchaser, and that consequently notice of it could not be imputed to him through the solicitor:—*Held* also, that, having regard to all the circumstances, and especially to the smallness of the purchase-money, and the expense which a regular investigation of the title would have occasioned, it could not be said that the sub-purchaser had wilfully abstained from making inquiries with the view of not receiving notice of any prior charge, and that, consequently, he could not be fixed with constructive notice of the original vendor's lien, but was entitled to hold his plot free from it.—Another sub-purchaser employed no solicitor in the matter, and made no

VENDOR AND PURCHASER—*continued.*
inquiries himself, but, as he said, left it to the original purchasers "to manage the business," and they prepared the conveyance to him, charging him for it:—*Held*, that he had made them his general agents in the matter, and that it was their duty as such to communicate the lien to him; that, consequently, it must be assumed that they did so, and that notice of the lien must be imputed to him.—The conveyances to the sub-purchasers contained the ordinary covenant by the original purchasers that the plots conveyed were free from incumbrances:—*Held*, that the covenantors not being solicitors, the fact that they entered into this covenant, though it was very improper for them to do so, did not, coupled with the other circumstances, shew that they were parties to a fraudulent scheme so as to rebut the legal presumption that they communicated the lien of the original vendors to the sub-purchasers for whom they acted as general agents, and that, consequently, the doctrine of *Kennedy* v. *Green* (3 My. & K. 699) did not apply.—The vendors at the request of two of the sub-purchasers released the plots which they purchased from the lien:—*Held*, that, it not being shewn that, when these releases were given, the vendors knew that the original purchasers had parted with any other portions of the land, the releases did not affect the right of the vendors to enforce their lien against the other sub-purchasers.—The action was brought by the original vendors against some of the sub-purchasers to enforce the lien against them. The Plaintiffs in their statement of claim alleged that three of the sub-purchasers, whose conveyances were expressed to be made for value, had in fact given no consideration for them, and they adduced evidence which proved this allegation in the case of one of the three:—*Held*, that, under the circumstances, the *onus* was on the Plaintiffs to prove the allegation in the case of the other two, and that they had failed to do so.—The doctrine of imputed and constructive notice discussed.
KETTLEWELL *v.* WATSON - - - 685

—— Sale under Settled Estates Act—Irregularity - - - - 41
See SETTLED ESTATES ACT. 1.

VESTING—Portions - - - - 806
See WILL. 7.

—— Property of borough—Local board - 176
See LOCAL GOVERNMENT ACTS. 1.

VESTING ORDER—Trustee Act - - 846
See TRUSTEE ACTS. 2.

VICTORIA—Bankruptcy in—Will proved in 674
See PARTITION SUIT.

WASTE—Tenant - - - - - 18
See LANDLORD AND TENANT. 2.

WEST RIDING REGISTRY - - - 685
See VENDOR AND PURCHASER. 3.

WILL—*Construction—Devise on Condition that Devisee shall relinquish Debt due to him by Testator—Death of Devisee before Testator.*] A testator devised land at *M.* to his son *R.* in fee, on the express condition that *R.*, his executors or administrators, should, within three months after the testator's death, relinquish all claim to a sum of £3400 due to him by the testator. And he devised other land to trustees, on trust for sale, and to stand possessed of the proceeds of sale, after payment of the deficiency (if any) of his residuary personal estate to pay his debts as thereinafter mentioned, on trust for his wife for her life, with remainder in trust for some grandchildren. And he devised all other his real estate not thereinbefore disposed of to his sons *J.* and *R.* in fee, in equal shares. And, after making some specific bequests of personal estate, he bequeathed the residue of his personal estate to trustees upon trust for conversion, and to stand possessed of the proceeds upon trust to pay his debts (except the debt of £3400 due to *R.* and two other specified debts), and on trust to retain the surplus for the benefit of his sons *J.* and *R.* in equal shares. But, in case his residuary personal estate should be insufficient to pay his debts (except as aforesaid), he directed that the deficiency should be paid out of the proceeds of the sale of the real estate which he had directed to be sold. *R.* died before the testator without issue:—*Held* (affirming the decision of *Fry*, J.), that the condition bound the land at *M.* notwithstanding the lapse of the devise, and that the debt of £3400 must be discharged out of it. *In re* KIRK. KIRK *v.* KIRK - - - - C. A. 431

2. —— *Construction—Devise to Trustees—Extent of Estate—Direction to pay Debts—Contingent Remainder—Failure of particular Estate.*] A testator, by his will made in 1838, directed his debts to be paid. And he devised specific real estate to four persons (whom he afterwards named as his executors), their heirs and assigns, upon trust and for the intents and purposes thereinafter mentioned, viz., upon trust during the minority of his daughter *D.* to receive the rents and apply the same for her benefit till she should attain twenty-one, and, on her attaining twenty-one, to pay to or permit and suffer her to receive the rents during her life for her separate use, without power of anticipation. And, from and after her death, upon trust for, and the testator thereby gave and devised the property to the issue children or child of the daughter who should live to attain twenty-one, in equal shares, if more than one, and to their respective heirs and assigns, with remainders over. And, after making other specific devises and bequests, the testator devised and bequeathed the residue of his estate and effects (subject to and charged with the payment of his debts) to one of his trustees absolutely, for his own use and benefit. The daughter *D.* survived the testator, and she afterwards married and had three children, but she died before any of them had attained twenty-one:—*Held*, that, by reason of the direction that the testator's debts should be paid, the trustees took the whole legal estate in fee simple in the specifically devised estate, and consequently that the contingent remainder to the children of the daughter had not failed by reason of the determination of her life estate before the happening of the contingency.—*Festing* v. *Allen* (12 M. & W. 279) distinguished.—*Creaton* v. *Creaton* (3 Sm. & Giff. 386) followed. MARSHALL *v.* GINGELL - - - 790

3. —— *Construction—Direction to Trustees to*

WILL—*continued.*

block up a House for Twenty Years—Declaration of Intestacy—Wills Act (1 *Vict. c.* 26), *s.* 3. Testatrix devised a freehold house, yard, garden, and outbuildings, to trustees and their heirs, upon trust to block up all the rooms of the house (except four rooms in which she directed that a housekeeper and his wife should be placed in occupation), and the coach-house, for twenty years; and subject thereto upon trust for a devisee in fee. She directed her trustees to visit the house and premises once in every three months to see that the trusts were effectually carried out, and declared that if any trustee should neglect or refuse to carry out the trusts aforesaid, any real or personal estate given or intended to be given to him by the will should go to the persons therein named, absolutely.—*Held*, that there was an intestacy as to the twenty years' term in the house, yard, garden, and outbuildings. Brown *v.* Burdett - - **667**

4. —— *Construction—Forfeiture on Alienation—Acceleration of subsequent Limitations—Want of Parties—Suit in Equity for Legal Demand pending at Commencement of Judicature Act—Judicature Act*, 1873, *s.* 22—*Rules of Court*, 1875, *Order xvi., r.* 13.] Specified freeholds and leaseholds were given by will to trustees upon trust to permit the rents to be received by *H.* for life, and after his death to convey to his children on their attaining twenty-one, with a proviso that if *H.* charged or incumbered the property, the gift to him should be absolutely forfeited, and that in such case the gift in favour of his children should at once take effect, and be acted upon by the trustees as thereinbefore directed. *H.* by a memorandum in writing, in 1869, charged his life estate in favour of *W.* *W.* shortly afterwards, on hearing of the clause of forfeiture, and before he had taken any benefit under the charge, repudiated the security and obtained another security from *H.* In 1874 the trustee of the will, by leave of the Court in an administration suit, filed a bill against persons who were in possession of the property under a title derived from a lessee of *H.*, to make them account for the rents. *H.* had no children.—*Held*, by *Fry*, J., and by the Court of Appeal, that the memorandum of charge produced a forfeiture of the life interest of *H.*, although *W.* had never claimed any benefit thereunder, and had afterwards disclaimed it, and although *H.* had no children, so that there were no persons to take under the gift over.—*Held*, by the Court of Appeal, that though the claim of the Plaintiff was a purely legal demand in respect of which a bill in equity could not formerly have been maintained, a decree could be made after the *Judicature Acts* came into operation, inasmuch as sect. 22 of the Act of 1873 provides that the Court shall have the same jurisdiction in pending suits as if they had been commenced in the High Court of Justice. Hurst *v.* Hurst - - **C. A. 278**

5. —— *Construction — Forfeiture on Bankruptcy—Fee simple Estate — Condition—Conditional Limitation — Repugnancy.*] A testator devised a freehold estate to the use of his daughter, "her heirs and assigns" for her separate use "subject, nevertheless, to the proviso hereinafter contained for determining her estate and interest in the event therein mentioned."

WILL—*continued.*

In a subsequent part of the will was a proviso that in case his said daughter should at any time be declared a bankrupt, then and thenceforth the devise thereinbefore made to her should be void, and the premises should thenceforth go, remain and be to the use of her children:—*Held*, that the devise did not operate as a conditional limitation, and that the condition in the proviso was void for repugnancy; and accordingly that the daughter was entitled to the property for an absolute estate in fee simple. *In re* Machu **838**

6. —— *Construction — Gift of "clear yearly sums," "free from all deductions"—Income Tax deducted by Trustees—Annuitant entitled to Payment of all Sums deducted.*] *A. B.*, in 1846, gave to his wife annuities or clear yearly sums for her life "free from all deductions in respect of any present or future taxes, charges, assessments, or impositions, or other matter, cause, or thing, whatsoever," and directed the trustees to appropriate and invest a sufficient part of his personal estate as a fund for the purpose of paying them. The trustees, acting upon the advice of counsel, deducted from all the payments to the widow the income tax:—*Held*, that the widow was entitled to be paid the annuities in full, free from any deduction; and also entitled to be paid all the sums which had been deducted.—*Lord Lovat* v. *Duchess of Leeds* (2 Dr. & Sm. 62) followed. *In re* Bannerman's Estate. Bannerman *v.* Young **105**

7. —— *Construction—Gift to Class of Children—Portions—Period of Vesting—Variation between Words of Gift and Words of Gift over.*] The rule that the Court will lean to a construction which will give portions to all of a class of children who may live to require them is not confined to settlements, but extends also to wills.—*Jackson* v. *Dover* (2 H. & M. 209) followed. *In re* Knowles. Nottage *v.* Buxton - **806**

8. —— *Construction—Gift to Class—Bequest to F. H. S. and R. S. share and share alike, "and after the decease of the said F. H. S. and R. S. to their Children share and share alike, and to their Heirs for ever."*] A testatrix bequeathed personalty in trust for *A. B.* for life, and after his decease for his issue, and on failure of his issue to *F. H. S.* and *R. S.* share and share alike, "and after the decease of the said *F. H. S.* and *R. S.* to their children share and share alike, and to their heirs for ever." *F. H. S.* died without having had issue, *R. S.* survived him and died leaving children, and *A. B.*, who survived them both, died without issue.—Upon a petition by the children of *R. S.* for payment out of a portion of the trust fund which was in Court:—*Held*, that, upon the authorities, the bequest must be construed as a gift after the respective deaths of *F. H. S.* and *R. S.* to their respective children, and that there having been an absolute gift to each of them in the first instance only cut down in favour of his children, in the events which happened the fund was divisible in moieties between the representatives of *F. H. S.* and the children of *R. S.* *In re* Hutchinson's Trusts - - - - - - **811**

9. —— *Powers of Management—Special Power of leasing Mansion-House—Discretion of Trustees.*]

WILL—*continued.*

A testator gave to his trustees a special power of leasing at their absolute discretion; which formed part of a special scheme of management of his mansion-house and estate for a limited period:—*Held*, in a suit for the execution of the trusts of the will that the Court would compel the trustees to exercise the power of leasing. TEMPEST *v.* LORD CAMOY'S - - - 576, n.

10. —— *Power of purchasing Real Estate—Power of mortgaging—Jurisdiction of Court to interfere with Discretion of Trustees.*] Where absolute discretion has been given to trustees as to the exercise of a power the Court will not compel them to exercise it, but if they propose to exercise it, the Court will see that they do not exercise it improperly or unreasonably.—Where the power is coupled with a trust or duty the Court will enforce the proper and timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bonâ fide* exercise of it.—A testator gave his trustees a power to be exercised at their absolute discretion of selling real estates, with a declaration that the proceeds should be applied, at the like discretion, in the purchase of other real estates. He also gave them power at their absolute discretion to raise money by mortgage for the purchase of real estates. A suit having been instituted for the execution of the trusts of the will, and a sum of money, the proceeds of the sale of real estate, having been paid into Court, one of the trustees proposed to purchase a large estate and to apply the fund in Court in part payment of the purchase-money, and to raise the remainder of the purchase-money by mortgage of the purchased estate. The other trustee refused to concur in the purchase:—*Held*, (affirming the decree of *Chitty*, J.), that the Court could not control the dissentient trustee in the exercise of his discretion in refusing to make the purchase, or in refusing to exercise his power of raising money by mortgage for the proposed purpose. TEMPEST *v.* LORD CAMOYS C. A. 571

11. —— *Revocation—Covenant not to revoke.*] A covenant not to revoke a will is not necessarily against public policy as being in restraint of marriage. ROBINSON *v.* OMMANNEY - 780

12. —— *Separate Use—Restraint on Anticipation—Payment on Separate Receipt—Income-bearing Fund—Personal Estate—Conversion.*] A testator bequeathed an annuity to his wife. And he directed his trustees and executors to provide for the same, either by setting apart a sufficient portion of the produce of his residuary personal estate, or by purchasing an annuity. And, after bequeathing some pecuniary legacies, he devised and bequeathed all his real estate, and the residue of his personal estate, to his two daughters, their heirs, &c., as tenants in common, so that the same might be enjoyed by them, during any and every coverture, as separate property free from marital control, and without power of anticipation. The executors paid the testator's debts, funeral and testamentary expenses, and legacies, and purchased an annuity for the widow. The residue of the estate then consisted of two sums of stock and a sum of cash. One of the daughters was married:—*Held*, that the will did not require the

WILL—*continued.*

conversion of the residue into money, except so far as might be necessary to provide for the annuity:—*Held*, also, that the married daughter's share of the stocks, they being income-bearing funds, could not be transferred to her, but that only the income arising from them could be paid to her:—But, *held*, that her share of the cash might be paid to her on her separate receipt.—*In re Ellis' Trusts* (Law Rep. 17 Eq. 409) followed.—*In re Croughton's Trusts* (8 Ch. D. 460) distinguished. *In re* CLARKE'S TRUSTS - 748

13. —— *Separate Estate—Legacy—Interest—Husband and Wife—Evidence.*] Under a bequest of £1000 upon trust to invest the same upon mortgage of the *B.* borough fund, and pay the interest as the same should arise to his widow during her life and widowhood, and after her death or second marriage in favour of testator's children by a former marriage, interest does not become payable to the widow except from the end of a year from the testator's death.—In the absence of proof of an unequivocal, complete, and final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not after his death, upon her uncorroborated statement that he expressly authorized her to carry on the business, on her own account, of a farm which she had rented before marriage, and to treat the proceeds as her separate property, admit her claim as against his estate to the proceeds of the farm which were invested by him during his lifetime, *In re* WHITTAKER. WHITTAKER *v.* WHITTAKER - - - 657

—— proved in *Victoria* - - - 674
See PARTITION SUIT.

WINDING UP.
See Cases under COMPANY. 7—12.

WITHDRAWAL OF AFFIDAVIT—Cross-examination - - - - 642
See PRACTICE. 14.

WITNESS—Bankruptcy - - 439, 601
See BANKRUPTCY. 12, 13.

—— Expenses—Auctioneer - - - 831
See PRACTICE. 15.

WORDS—"Available for adjudication" - 605
See BANKRUPTCY. 9.

—— "Clear yearly sums" - - - 105
See WILL. 6.

—— "Free from all deductions." - - 105
See WILL. 6.

—— "Held shares" - - - - 849
See COMPAMY. 9.

—— "New street" - - - - 621
See LOCAL GOVERNMENT ACTS. 2.

—— "Sole Trustee" - - - 846
See TRUSTEE ACTS. 2.

—— "True copy" - - - - 871
See BILL OF SALE. 30.

WRIT—*Fieri facias* - - - - 69
See SHERIFF.

WRONGFUL SEIZURE—*Fieri facias* - 69
See SHERIFF.

YORKSHIRE REGISTRY - - - 685
See VENDOR AND PURCHASER. 3.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

U.L.SD/191-200